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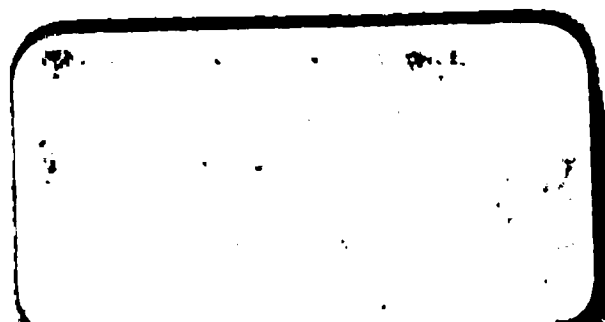
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REPORTS OF CASES
ARGUED AND DETERMINED IN THE
COURT OF COMMON PLEAS

FOR THE
CITY AND COUNTY OF NEW YORK.

By CHARLES P. DALY, LL. D.,
CHIEF JUSTICE OF THE COURT.

VOL. IV.

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J U D G E S

OF THE

C O U R T O F C O M M O N P L E A S

SINCE ITS REORGANIZATION IN 1821,

WITH THEIR PERIODS OF SERVICE.

JOHN T. IRVING	1821-1838
MICHAEL ULSHOEFFER	1834-1850
DANIEL P. INGRAHAM.....	1838-1858
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CHARLES H. VAN BRUNT.....	1869*
HAMILTON W. ROBINSON.....	1870*
RICHARD L. LARREMORE.....	1870*
JOSEPH F. DALY.....	1870*

* Still on the Bench.

JUDGES DURING THE PERIOD EMBRACED IN THIS VOLUME.

CHARLES P. DALY, CHIEF JUSTICE.
 FREDERICK W. LOEW,
 CHARLES H. VAN BRUNT,
 HAMILTON W. ROBINSON,
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CASES
ARGUED AND DETERMINED
IN THE
COURT OF COMMON PLEAS,
FOR THE
CITY AND COUNTY OF NEW YORK.

**RICHARD ATKINSON AND ANOTHER v. THE GREAT WESTERN
INSURANCE COMPANY.**

Barratry, as a marine term, means an intentional injury to the vessel or to the cargo; or some unlawful, fraudulent, or criminal act, whereby or in the prosecution of which, loss or injury arises to the owners of the vessel or of the cargo, or to the insurers. It does not embrace what in the law is denominated negligence.

The defendant indorsed upon its open policy of insurance, as an additional risk to be covered by the policy, 202 bales of cotton from Augusta, Georgia, to Liverpool, England. The goods were shipped by railroad from Augusta to Charleston, thence to be shipped to Liverpool by the barque Victoria, the master giving a clean bill of lading for the 202 bales, freight having been engaged for the whole by that vessel. For want of room in the Victoria, the master sent 77 bales by another vessel, which arrived safely at Liverpool. Thirty bales of the remainder were stowed in the hold, and ninety bales were stowed on deck of the Victoria, without notice to the shippers, and against the remonstrance of the agent of the owners of the vessel. During the voyage, the ninety bales on deck were thrown overboard to save the vessel. One of the perils insured against by the policy was "the barratry of the master and mariners."

***Held*, in an action against the insurers to recover for the loss of the ninety bales jettisoned, that the act of the master in stowing the cotton on deck, did not amount to barratry within the legal meaning of that term.**

***Held further*, that the goods, having been carried on deck without the knowledge or implied consent of the underwriter, they were not within the protection of the policy, and being jettisoned, there could be no claim for contribution upon a general average for their loss.**

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It seems, that the only remedy is an action against the master or his principal for the damages sustained through the negligence of the master in carrying the cotton on deck.

“Barratry” and “negligence,” in law, defined and distinguished.

Although the rule is well settled that if the proximate cause of the loss, *e. g.*, jettison of the goods, was the peril insured against, and the remote cause was some act of negligence on the part of the master or mariners, *e. g.*, the stowage of goods on deck, the underwriters are liable, yet the rule does not apply where there has been a deviation or departure, producing a change of risk so material as to discharge the underwriters from the policy altogether.

Where an underwriter insures goods upon a clean bill of lading, there is an implied warranty on the part of the insured that the goods are or will be stowed in the usual and ordinary manner, which is in the vessel’s hold, and if this is not done, but the goods are carried on deck, except in a case where that is justifiable, the policy never attaches, for the reason that it is a greater risk than the underwriter agreed to take.

THE action was tried before Judge Van Brunt and a jury. The court directed a verdict for the plaintiffs for \$19,361 51, ordering the exceptions to be heard in the first instance at General Term, judgment in the mean time to be suspended.

The action was brought to recover for the loss of ninety bales of cotton, insured by the defendants under an open policy issued to the plaintiffs in January, 1866, and which had been continued by indorsement of successive additional amounts, to a time subsequent to the insurance in question.

The body of the policy insured “R. Atkinson & Co., on account of whom it may concern, in case of loss, to be paid to them in the gold currency of the United States, at and from Columbus and other ports and places in the interior of the State of Georgia, *via* Apalachicola, to port or ports in Great Britain. On cotton—to cover all shipments, their own, or consigned to them, or in which they have an interest by vessels sailing on and after 15th December, 1865. To attach, from time of shipment, and also to cover the risk of fire on cotton in transit while waiting shipment.” The enumeration of perils insured against included “barratry of the master and mariners,”—cotton, “valued at \$190 per bale unless otherwise agreed.” “All approved indorsements, on pass book to apply in all respects to that policy, the same as if indorsed thereon;” also, “to cover such other risks as may be approved and indorsed hereon.”

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A subsequent indorsement was in these words: "March 5th, 1866. It is understood and agreed that this policy covers from the interior of the State of Georgia *via* the Atlantic as well as the Gulf ports to port or ports in Europe." On the 31st October, 1866, the plaintiffs reported to the defendants as a risk to be covered by the policy, 202 bales of cotton from Augusta, Georgia, to Liverpool, England, valued at \$26,260, gold.

The 202 bales of cotton were purchased at Augusta by Branch, Sons & Co., of that place for account of the plaintiffs, and by the latter's order were shipped by railroad to Charleston, thence to be shipped to Liverpool per bark Victoria. Freight of the whole of the cotton was engaged, and the master of the Victoria gave a clean bill of lading for the whole. Seventy-seven bales, however, were left out of the Victoria for want of room, and were sent by the brig Albert, arriving safely at Liverpool. Ninety bales taken by the Victoria, being the ninety bales in question, were carried on deck, and on the voyage were jettisoned in a storm. The plaintiffs in New York had no knowledge of the shipment of these bales on deck until they heard of the loss, by telegraph, on the arrival of the Victoria at Liverpool, and the defendants had no knowledge of it. The rate of premium was fixed as for cargo under deck, and the proof was that the regular rate for deck cargo would be three times as much as for the same cargo under deck.

Street Brothers & Co., of Charleston, agents of the owner of the vessel, knew of the lading of the cotton on deck, and stated to the captain that as he had given clean bills of lading for the cargo, he was bound to carry the cotton under deck, or to provide for it on deck by extra insurance; that the insurance taken on clean bill of lading would not cover the cotton on deck. The bill of lading in the margin stated that the cotton was insured in the open policy of R. Atkinson & Co., the plaintiffs. By arrangement between the agents of the vessel, the captain, and supercargo, the latter, before sailing, wrote to the consignees of his owners in London, stating that the cotton was on deck, and requesting them to insure the same for \$9,000 gold, for account of the vessel.

The defendants at the trial, moved the court to dismiss the

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complaint, which was denied, and the defendants excepted. Also to direct a verdict for the defendants, which was denied, and defendants excepted. The court directed a verdict for the plaintiffs, the exceptions to be heard in the first instance at general term.

Evarts, Southmayd & Choate, for defendants.

I. Goods carried on deck, without notice to the underwriters, are not covered by a general insurance of merchandise. Even with notice, they must be insured specifically in the policy as on deck, or they will not be covered. Here there was no notice, and it was expressly proved to be wholly unusual to ship cotton on deck. The defendants' policy against perils of the sea and other marine perils never attached. (1 Arnould Ins. 2d Am. ed. 218, and cases cited; *Taunton Copper Co. v. Merchants' Ins. Co.* 22 Pick. 108; *Lenox v. United Ins. Co.* 3 Johns. Cas. 178; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429; *Smith v. Wright*, 1 Caines, 44.) By the very terms of the policy, the defendant insures, "Beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on the said vessel," and within the established sense of the clause, the cotton was never "loaded on board" until stored under deck in the usual manner. It was simply a case of bad and improper storage, a risk not included in the enumerated risks of the policy, or chargeable to the underwriters.

II. The cotton being carried on deck without notice, and jettisoned to save the vessel and other interests, was not lost by barratry. The proximate cause of the loss was the jettison of goods to which the policy against the marine risk, including barratry, had never attached—and the conduct of the master and mariners in making the jettison was not barratrous, but appears to have been unexceptionable. Stowage and carriage of goods on deck without notice, or other bad stowage, is not barratry, and comes within no possible definition of the term, and, besides, the stowage of the cotton on deck was not the proximate cause of the loss, or the cause of it in judgment of

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law. (Abbott on Shipping, p. 183; 2 Phil. Ins. p. 603; *Lockyer v. Offley*, 1 T. R. 259; *Vallejo v. Wheeler*, Cowper, 143; *Laroton v. Sun Mutual Ins. Co.* 2 Cush. 500; *Grill v. The General Iron Screw Company, Limited*, Eng. Law Rep. 1 C. P. 600; and in Exchequer Chamber, 3 C. P. 476.) (a.) That cargo on deck, not insured as such, is not covered by the policy, has been the general rule of commercial law established for ages, in respect to policies containing "barratry" as well as the other marine perils, and this is the first time that a claim so preposterous has been set up. (b.) There was no element of fraud or crime in the act of storing the cargo on deck, or any evidence of criminal or fraudulent or evil intent, either to benefit himself or to injure his owners, or even that he acted against his better judgment in so doing. The assent and concurrence of his owners, as represented by their agents and authorized supercargo, is expressly proved. (2 Arnould Ins. pp. 819, 822.) (c.) The act of the master, in storing the cotton on deck, bears no resemblance to any of the recognized classes of barratrous acts. (d.) There is no such thing as loss of goods by barratry, except by some act which is barratry of the master or mariners against the owner of the ship. If by such an act the owners of goods suffer loss of their goods, they may recover on the barratry clause of their policy, but not otherwise, for no act can be barratry which is sanctioned by the owner of the ship. (2 Arnould, 831; *Stamma v. Brown*, 2 Str. 1173; *Nutt v. Bourdieu*, 1 T. R. 323.) (e.) Where the act alleged to be barratrous is in itself a violation of law or a crime, it is not essential that it should be done by the master for his own benefit or with intent to injure his owners. (*Todd v. Ritchie*, 1 Stark. 240; *Abbott Ship'g*, 184; *Earle v. Rowcroft*, 8 East, 126.)

Augustus F. Smith, for plaintiff.

I. The act of the master in stowing this ninety bales on deck *was barratry*. He knew that he was violating his duty, and putting the plaintiffs' property in peril. His own consignee warned him. The act was wilful, deliberate, and secret. Barratry is an act of wrong done by the master against the ship and goods. This is the definition of bar-

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ratry by Lord Hardwick, in *Lewen v. Suasso*, and is said by Arnould to be the tersest and perhaps the best definition of the word. (2 Arnould on Insurance, 821, note h.)

Barratry includes every species of fraud concerning either the ship or cargo, committed by the master in respect to his trust as master, to the injury of the owners or shippers. (*Cook v. Commercial Ins. Co.* 11 Johns. 40; *Vallejo v. Wheeler*, 1 Cowper, 143; *Knight v. Cambridge*, 8 Mod. R. 230; 2 Arnould on Ins. pages 820–822; 3 Kent's Com. 305; 1 Phillips on Ins. § 1074; *American Ins. Co. v. Bryan*, 26 Wend. 578; *Boehm v. Combe*, 2 Mees. & S. 172.)

II. Under the circumstances of this case, it cannot be claimed that the policy did not cover the ninety bales on deck, for they were covered by the policy the moment they were shipped upon the railroad at Augusta, and as the policy had once attached, the cotton could not be taken from under the protection of the policy by the barratry of the master. When he deliberately put it on deck, knowing that he violated the trust reposed in him, it was barratry, and the defendants were liable.

BY THE COURT.*—DALY, Chief Justice.—Among the risks insured against was barratry of the master and mariners, and the question presented in the case is, whether the ninety bales of cotton were lost through an act which the law would denominate barratry on the part of the master.

These ninety bales were stowed upon deck, and were jettisoned in a storm. They were a part of 202 bales covered by the policy, which, by the plaintiff's order, were shipped from Augusta, Georgia, to Charleston, South Carolina, by railroad, thence to be shipped to Liverpool by the barque *Victoria*, the master giving a clean bill of lading for the 202 bales, the plaintiff's agent having engaged freight for the whole by that vessel. For want of room in the *Victoria*, the captain sent seventy-seven of the bales by another vessel, the *Albert*, which arrived safely in Liverpool. Thirty of the bales were stowed in the hold of the *Victoria*, and the remaining ninety were

* Present, DALY, Ch. J., ROBINSON, and LARREMORE, J. J.

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carried upon her deck, and in a violent storm were thrown overboard for the preservation of the vessel.

Before the *Victoria* sailed, a merchant in Charleston, whose firm was acting as agents for the vessel, discovering that the captain was stowing cotton on deck, opposed it, and wanted him to send the cotton by another vessel. He advised the captain of the responsibility he was assuming, and told him substantially, that, as he had signed clean bills of lading, he was bound either to carry the cotton under the deck, or to provide for it on deck by extra insurance; that the insurance taken on a clear bill of lading would not cover cotton on deck. But the captain, notwithstanding this remonstrance, stowed the cotton upon the deck.

This, it is claimed, amounted to barratry on the part of the master, within the legal meaning of that term, in the comprehensive sense in which it has been defined by Lord Hardwicke, as "an act of wrong done by the master against the ship and goods" (*Lewin v. Suasso*, Posthelwhaite's Dic'y, Assurance), which is commended by Arnould as the tersest, and, perhaps, best definition of the word (Arnould on Insurance, 821, note h).

This definition of Lord Hardwicke is too general to be of much practical value in determining whether the act of the captain in stowing these ninety bales of cotton upon deck, without providing for the increased peril by extra insurance, was or was not barratry. It was an act of negligence for which he or the owner of the ship may have been responsible, and in that sense was a wrong to the goods or the ship within the language of Lord Hardwicke; but it does not necessarily follow from this that it was what the law denominates barratry. What was said by Lord Hardwicke, moreover, has not the weight of a decision. It was but a general observation. The question in the case was not whether barratry had been committed, for the captain there was the general owner of the ship, which he had bottomried and mortgaged, but of which he had the control and navigation; and the point determined by the court, so far as can be gathered from the imperfect report of the case in an elementary work, was that the owner

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of a ship could not, either at law or in equity, be guilty of a barratry concerning the ship.

In the solution of the question before us, therefore, we must look beyond this definition to ascertain the exact legal meaning of barratry, and the inquiry is by no means easy, for it is a question that has greatly perplexed the courts, and from what has been said respecting it, in comparatively recent cases, the meaning of it is nearly as uncertain now as when the question was first agitated in Westminster Hall, one hundred and fifty years ago.

It was considered by the English courts in 1724, in the case of *Knight v. Cambridge*, reported in the eighth volume of the Modern Reports, 230, afterward in the second of *Ld. Raym.* 1349, and again in *Strange*, 581. In the first report (in 8 Modern), the court is put down as saying that "Barratry is a word of more extended signification than only to include the master's running away with the ship; it may well include the loss of the ship by his fraud *or negligence*;" but in the second edition of the volume it is stated in the margin, that fraud *or negligence* would not have been good; but this was afterwards omitted in the fifth edition, known as the corrected and standard one of the Modern Reports.

In Lord Raymond's report of the case, which is a very brief one, he states that the ground was taken, that, as the owner of the goods has his remedy against the owner of the ship for any prejudice he receives through the fraud or negligence of the master, there is the less reason that the insurer should also be liable to him for the act, as an act of barratry, and that if barratry imports fraud, it does not import neglect; the allegation having been that the ship was lost through the fraud *and neglect* of the master, a point which the court met by saying, "Barratry imports fraud, and he that commits a fraud may properly be said to be guilty of a neglect, viz., of his duty;" to which the court added the general observation that barratry was not confined to the running away with the ship, "because it imports any fraud." The report in *Strange* is still more brief, but if correct, more important, because it states that the objection taken was, that the allegation, fraud, *and negligence*

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of the master was more general than the word *barratry*, and was, therefore, not *within* the *policy*, and that the court said: "*The negligence certainly* is not, but the *fraud* is." * * It further appears in respect to this case, from the argument of Justice Buller, and the statement of Lord Mansfield, in *Vallejo v. Wheeler* (Cowp. 143), that the act of the master in *Knight v. Cambridge* was sailing without the paying port duties, which Buller argued might have been by accident as well as by design, but which, as it subjected the ship to forfeiture, was held to be barratry. Lord Ellenborough afterward referred to a manuscript note of Mr. Ford, in respect to the question in this case of *Knight v. Cambridge*, which, after stating that fraud was barratry, added: "If the master sail out of the port without paying port duties, whereby the goods are forfeited, lost, or spoiled, that is barratry." This Lord Ellenborough thought was probably the question decided upon the trial, and at the argument (*Earl v. Rowcroft*, 8 East, 126), and the act of the captain may possibly have been regarded as coming under the category of fraud, upon the ground that the design or effect of it was to defraud the government of the port duties.

The next case was *Stamma v. Brown* (Strange, 1173), in which it was held, that a deviation from the voyage by the master for the benefit of the owners was not barratry, although it led to the destruction of the ship and the loss of the goods insured, the court holding, according to the report in Strange, that to make it barratry, *there must be something of a criminal nature*, as well as a breach of contract. In a further account of this case, it is stated that Chief Justice Lee defined barratry to be, "some breach of trust in the captain *ex maleficio*," and said (it being a policy upon goods), "barratry must be *ex maleficio* with intent to destroy, waste, or embezzle the goods," *per* Lord Ellenborough, in *Earle v. Rowcroft*, *supra*.

The next case was *Elton v. Brogden* (Strange, 1264), in which the crew compelled the captain to return, contrary to his orders. It was *held*, that this was not barratry, for two reasons. 1. That the act of the master was excused by the force which he could not resist. And, 2. Because the ship was not run away with to defraud the owners.

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This was followed, in 1774, by *Vallejo v. Wheeler*, reported in Cowp. 143, and more fully in Lofft, 631, in which the legal meaning of the word was elaborately discussed; the argument of Alleyn for the plaintiff, as reported in Lofft, being especially distinguished for its research and learning. In the first case (*Knight v. Cambridge, supra*), the court said that barratry came from *barat*, signifying *fraus and dolus* (fraud and deceit), for which it would seem, from the marginal note, the court relied upon the glossary of Dufresné and Du Cange, and the French dictionary of Furetiere. In the succeeding case of *Stamma v. Brown (supra)*, the plaintiff's counsel cited in support of the same meaning the Italian and Spanish dictionaries, respectively, of *Florio* and *Minshew*, and in support of these lexicographers, Alleyn in *Vallejo v. Wheeler*, cited this definition from *Ferrieres Dictionaire de Jurisprudence*. "Barratrie en term de marine est une *tromperie* ou une *malversation* qui se commet par patron, ou capitaine d'un vaisseau, pour faire perdre les marchandises à ceux à qui elles appartiennent." The following from Savary's *Dictionaire Universel de Commerce*: "Barratrie de patron en terme de commerce et marchandise veut dire les larcins, les desguisemens et alterations des marchandise qui peuvent causer le maitre et l'equipage d'un vaisseau; et generalment toute les *supercheries* et *malversations* quil s'mettent souvent en usage, pour *tromper* les marchand, chargeur et autres qui ont interêt au vaisseau," and gave this definition of the word from Denisart's *Collection de Decisions, Nouvelles*, etc., relative a la Jurisprudence, a work which had been published but some two or three years before in Paris. "Ce mot signifie malversation et tromperie par un capitain ou patron de navire marchand, dans ce que a rapport a la qualite et a la quantite des marchandises." He also claimed that it meant deceit or malversation in the master, in the ordinances of Louis XIV, article 28, and showed that the ordinances of Rotterdam, number 43, and of Copenhagen, number 38, distinguished between barratry and *neglect*.

Lord Mansfield, in delivering the judgment of the court, declared that the previous English cases did not afford any precise definition of what barratry was; that the nature of it had

not been judicially considered or defined in England with accuracy, and then undertook to inquire into the etymology of the word, which ended by his leaving that inquiry no further advanced than he found it. Justice Aston, however, so far from agreeing with Lord Mansfield, expressed his astonishment that that there should *then* be any doubt as to what was meant by barratry, and declared, as his language is reported in Cowper, that it “comprehended every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured,” and still more strongly as his words are given in Lofft: “I think it (barratry) has always been the same in *idea* and *general meaning*, though differing in terms and not always settled in practice, *deceit, villainy, knavery, and fraud*,” and the entire court united in the opinion that it is barratry where a master goes out of his course, for the purpose of smuggling for his own benefit, in the course of which deviation the vessel and cargo are injured.

The authorities referred to in this case by Mr. Alleyn show that as barratry was then understood in France, it meant, in general terms, fraud and malversation. But Emerigon, whose work was published some few years after this case was decided, gives it, at least in France, a much more extended signification. He says that it commonly implies the crime of which a captain is guilty in being faithless, or treasonable to his office; that every fault into which a captain falls is not barratry unless accompanied by deceit or fraud; but then, as contradistinguished from this general rule, he adds, still among us (the French), it comprises the case of simple faults, as well as that of fraud; and relies upon Valin and Pothier for the statement, that, in addition to all kinds of fraud, it embraces simple imprudence, want of care or unskillfulness, either in the master or the crew (Emerigon by Meredith, p. 292). Boulay Paty, in his edition of Emerigon, t. 1, p. 370, says, that the commissioners of the French commercial code intended by barratry only wilful infidelity, or treason to his duty, on the part of the master, or the seamen, but that the Cour Royale of Rennes decided that custom had given the word a more extended meaning, and that it included simple faults.

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If such a change has been brought about in France by custom since the adoption of the *Code de Commerce*, in 1807, it has not been the case in this country nor in England, and with us the inquiry as to the meaning of the term is embarrassed by no such consideration. On looking into the authorities, moreover, to which Emerigon refers, I doubt if the question has ever been examined as carefully in France as it has been in England, and the custom referred has probably grown up from the impressions conveyed by the observations of Valin, Pothier and Emerigon, writers who gathered their idea of barratry chiefly, if not exclusively, from what is found respecting it in *Le Guidon de la Mer*, ch. V, § 6, ch. IX, the unknown author of which compilation had not very clear ideas about it, as Pardessus has pointed out (*Us. et Coutumes de la Mer*, t. 2, p. 406, a 1, 3, ed. 1847); Pardessus' criticism of the first and third articles of the ninth chapter of *Le Guidon* being, that the author considers as barratry accidents or events (*evenements*) in which there is not and cannot be any fault in the master, by drawing a distinction between barratry on his part, which is obligatory (*forcée*) or voluntary (*volontaire*), a distinction which the learned commentator declares to be absurd, and as demonstrating that the author did not himself understand the subject upon which he was speaking.

The passages in *Le Guidon* respecting barratry, upon which Emerigon, Valin and Pothier rely, are, even in the amended text of Pardessus, exceedingly obscure. They may be rendered in English substantially as follows: "Barat or Baraterie; changes or alterations by the master; changes which he makes in the vessel or the voyage; deviations, by going to other ports, places or havens; malversations, robberies, larcenies, alterations, disguising the merchandise, all proceeding from the negligence of the master, or the crew; of which the insurer takes the risk and indemnifies the insured; with the understanding, however, that if the owner, or his factor, is in a place where he can have justice, it shall be his duty, in the first instance, to proceed against the master, that the damages may be lessened out of the freight before he addresses himself to the insurer" (ch. IX). "On the other hand, if it is found that

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the loss or injury was caused from defects in the ship, as if the stays or hatchways were not well fastened or caulked; or the vessel was not staunch, from the want of repair, and through that cause the water entered and destroyed or injured the merchandise, the master bears the loss, which is to be deducted from the freight, without the insurer or the merchandise contributing. And generally the master is answerable for all which arises from his fault, or that of the ship, if he have wherewith to pay, or where the loss did not exceed the freight. If it exceeds, and he has not the means to make restitution, the insured is held to diligence by the law of *Baraterie* of the Master, and must make it appear that he did all in his power before he can come upon the insured" (ch. V, § 6. Cleriac, Rouen, 1671, pp. 213, 244).

In the early commerce of the Mediterranean and the Baltic, as will appear from numerous passages in the *Consolato del Mare* and in other primitive maritime codes, the master and the ship were answerable for loss or injury to goods arising from negligence or other culpable cause. And where he was not an owner of the vessel, which he commonly was, in whole, or in part, he was answerable for injuries to it through his fault. After the practice of marine insurance came into use, in the thirteenth century, it was, in some of the maritime cities, customary to hold the insurer responsible for such losses, and in others it was not. And where the insurer was responsible, the practice was, no doubt, as stated in *Le Guidon*, that he was answerable only where the owner, after due diligence, was unable to obtain indemnity from the master.

Magens, the author of the earliest English treatise upon the law of insurance, published in 1755, after referring to a policy made in Florence in 1523, and another made in Ancona in 1567, under which the insurer was answerable for the barratry of the master, and after pointing out the regulations upon the subject in the ordinances of Stockholm and Amsterdam, and that such a liability existed in the policies which were then, in 1755, made in London and in Antwerp, gives it as his opinion, that the insurers are not answerable, under a barratry clause, for small pilferings or extraordinary leakages proceeding from

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bad casks, or where the injury to the goods arises from bad stowage, or by their being put in a place exposed to wet, or from a deficiency in the calking of the decks, or otherwise (1 Mogens, pp. 50, 75, 76), showing that at that time negligence of this description was not barratry. In this connection, however, he refers (p. 51, vol. 1) to an ordinance of Florence, in 1523, which declared that if the goods are stowed on deck with the permission of the insured, then the insurers are not answerable for the damage; but if the master stowed them on deck without the leave of the owner, or of the person who made the insurance, then the insurers shall be obliged to pay, and may have their redress against the master; which is substantially the case now before us. He refers also to another provision in the same ordinance, which he says declares that the insurer shall first pay, and afterward go to law.

The liability of the insurer, in this early Florentine ordinance, is predicated upon the remedy which it is therein recognized he had against the master, after paying the insurance; but the existence of any such remedy, under the system of law prevailing at the present day, there being no privity of contract between the insurer and the master, is denied by the elementary writers upon the law of insurance (2 Phillips on Insurance, 2003). Lord Kenyon, in a *nisi prius* case (*Bird v. Thompson*, 1 Esp. 339), thought that the insurers might maintain an action against the master, when the loss paid by them was occasioned by his barratry. He admitted, however, that he "knew of no action of that sort ever having been brought," and it has been decided in several well-considered cases, that no such action can be maintained by the insurer against an incendiary, to recover for the loss paid upon a fire policy, or to recover from the person whose negligence was the cause of the death, the loss paid upon a life policy—cases certainly analogous in principle (*Rockingham Insurance Co. v. Bosher*, 39 Me. 253; *Connecticut Mut. Ins. Co. v. The New York & New Haven R. R. Co.* 25 Conn. 265).

Valin, in his commentary upon the ordinance of Louis XIV, infers that loss or injury arising from any fault or negligence in the master is barratry, and there is certainly a foundation

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for that construction in the very general language of the twenty-eighth article of that ordinance, and the opinion of Pothier is to the same effect. But it is to be borne in mind that when Valin wrote his commentary, the maritime law in France had fallen into great neglect (Reddie's Historical View of the Law of Maritime Commerce, part 4, ch. 4, § 6), and that Pothier, by his own admission, had given but little attention to maritime law—indeed, so little, that his inexperience, in the opinion of his editor, Estrangin, involved him in gross and palpable errors (Meredith's Introduction to Emerigon, XIII, XXII, XXVI).

When the full meaning of a word is obscure, or the extent to which it can be applied doubtful, the proper course is to inquire into its origin and history, which, if ascertainable, will generally disclose its exact meaning; for etymology sheds light where all other sources of inquiry fail. This no one of these eminent French writers attempted. Indeed, Emerigon knew so little respecting the term, that he speaks of it as a barbarous word, unknown to antiquity. Such an inquiry at that time was difficult. Sir Allan Park, writing at the close of the last century, said: "The derivations of barratry have rather tended to confound than to throw any light upon the subject; for its root has been so frequently altered, according to the caprice of the particular writer, that it is impossible to decide which is the true one" (Park on Insurance, ch. 5). This is rather an exaggerated statement. The previous inquiries in England had mainly been in the right direction, and the embarrassment even then was not so great as this writer supposed, while the advances that have since been made in philological inquiries enable us to trace the word to its origin, and to show that the English tribunals have been right in the construction they have put upon it, and that the French jurists have expressed opinions upon insufficient information.

It came into use in England, after the conquest, as an Anglo-Norman word, signifying strife, contention or wrangling; being in that sense, as I infer, directly derived from an old French word, *barraté*, signifying the tossing up and

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down of the contents in a churn, Cotgraves' French and English Dictionary, London, 1632, and was used in that sense by early English writers in several forms, *barrat*, *baret*, *barrette* (Boucher's Glossary; Coleridge's Dict'y of Old English Words; Kelham's Norman Dict'y; Wright's Provincial Dict'y; Havelok the Dane, *Roeburghs Club Collections*; Owl Nightingale, *Percy Soc. Col.*)

It had also the further meaning of deceit and fraud from another old French word, *barat*, signifying deceit, trickery or cheating, and which, like the other French word, *barrate*, came from a common origin.

From these sources, two words came ultimately into use in England, *barratry* and *barrator*, and Coke, in defining barrator, has left us a very clear idea of the legal meaning of both words. A barrator is, he says, a mover, stirrer up and maintainer of strife in three ways: 1. In disturbing the peace. 2. In taking or detaining the possession of houses, lands or goods, which are in controversy, by *craft* or *deceit*. 3. By sowing calumnies, etc., whereby discord and disquiet ariseth between neighbors (Case of Barratry, 8 Co. 366). We have here both meanings, *strife* and *contention*, and *deceit* or *fraud*, growing out of the compound origin and synonymous use of the word. Indeed, in the sense of strife and contention, it was used in connection with policies of insurance, as late even as the middle of the last century.

Kersey, in his edition, in 1707, of Phillips' New World of Words, gives, as the sole definition of barratry, "a word that is used in policies of insurance for ships, signifying dissensions and quarrels among the officers and seamen," and Martin, in his English Dictionary of 1748, says, barratry "in insurance, signifies dissensions and quarrels among officers and seamen." But Kersey, who published a dictionary of his own, between these periods, incorporates it simply as a law term, as follows: "Barratry (L. T.), when the master of a ship cheats the owners or insurers, either by running away with the ship or embezzling their goods" (Kersey's Dict'y, 3d ed. 1721). In the succeeding and fuller work of Bailey, it is given as a term in commerce, thus: "Barratry, Barretry (in commerce), is the

master of a ship cheating the owners or insurers, either by running away with the ship, sinking of her, or embezzling the cargo" (Bailey's Dict'y, folio of 1736), and this exposition of its meaning has been substantially followed by the lexicographers to the present time. Ash, in his dictionary of 1775, succinctly defines it as "the crime of the ship master who cheats the owners," and Webster, in a more elaborate definition, limits it to a fraudulent breach of duty, a wilful act of illegality or breach of trust, with dishonest views, by the master or mariners, to the injury of owners of the cargo or ship, without the consent of the party insured (Webster's Quarto Dict'y, 1864).

How the same word came to express things so distinguishable from each other as strife or quarreling, and deceit or fraud, is explainable by its origin and history. The root or parent word is to be found in the Sanskrit. It is *Bharat*, meaning *war* (Haughton's Sanskrit Dict'y, Lond. 1833). From this was formed, in the Sanskrit, another word, *Bharata*, meaning an act which is a trespass against morals or justice, or an unjust or immoral action (*Id.*), probably used in its first formation to designate an unjust war, and which afterward acquired, in the Sanskrit, a more general signification; both of which words have survived, and are now in use in the modern Hindustani; the latter slightly modified in form, *bhaari*, *barhi*, *burai*, and with other words formed from it, as *bharam*, *bharamani*, but retaining in their various forms the same general signification, which may be illustrated by a word now in very general use in India, *barakat*, evil (Forbes' English and Hindustani Dict'y; Shakespeare's Hindustani and English Dict'y).

These two primitive words, *Bharat* and *Bharata*, with significations more or less equivalent, are to be found in some form or other in the tongues of all the nations of the Indo-European group that derive their language from this parent source. Thus *barathrum*, both in the Greek and in the Latin, was the name of the pit into which the condemned criminals were thrown, and as a word for pit, dungeon, or the infernal regions, became *barathro* in the Spanish and the Portuguese, and *baratro* in the Italian (Morin Dict'y Etym'y, Paris, 1809;

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De Larremendi Dict'y Castellano, &c. S. Sebastien, 1853 ; Roquette Dict'y Portugais, &c. Paris, 1860 ; Landais Dict'y Francais, &c. Paris, 1834 ; Baretti Diz Italiano, &c. Firenze, 1832 ; Andrews' Latin Lexicon ; Potter's Grecian Antiquities, b. 1, c. 25). In the Latin, *barratus* was the tumultuous shout of the Roman or German armies when about to engage (Cole's Latin and English Dict'y, Lond. 1679 ; Andrews' Latin Lexicon, *baritus*.) In the earliest known forms of the tongues that prevailed in France, *barat* was the word in general use for deceit, cheating, decoying, finesse and trickery, and in this sense was incorporated in the form of the prayer used by the penitents in the churches in asking forgiveness. (Du Cange and Dufresne's Glossarium, Paris, 1773 ; Menage Dict. Etymologique de la langue Francais, Paris, 1750.) In old Armorican it meant perfidy. (Necot. Dict. Francois Latin, Paris, 1573 ; Menage id.) In old Breton, *barad* was the word for treason. (Pelletier Dict. Breton, Paris, 1752.) In Provencal *barat*, *baratel*, *baratie* and *baratie*, are all words signifying deceit, or deception. (Roquefort Glossaire de la langue Romane, Paris, 1808. Honnorat, Dict. Provencal, Paris, 1846.) The same word, in many forms, was in extensive use throughout Europe in the middle ages, at the fairs, and in the rude commerce of the Mediterranean. In the Basque it was *barata* ; in the old Castilian, *baraja* ; in the Spanish, *barato* and *barata* ; in the Portuguese, *barata*, *barateria*, and in the Italian, *baratta*. (De Larramendi Dic. Castellano Bascuence y Latin, S. Sebastien, 1853 ; Dic. Castellano, Madrid, 1732 ; Vocabulario Acad Della Crusa, Madrid, 1786 ; Da Costa Dic. Portuguez, &c. Lisbon, 1784 ; Roquette Dic. Portugais, Paris, 1860 ; Toselli Origine della lingua Italiana ; Florio, Dic. by Torriano ; Barretti Diz. Italiana ed Inglesi, Firenze, 1832 ; Diz. Della Lingua Italiana, Bologna, 1820.) In all these languages, *barat*, or some word formed from it by a change in the termination,* as will appear by the lexicographers above quoted, meant strife, contention, quarreling, confusion or disorder, intentional wrong, deceit, cheating, maliciousness, and also bartering and selling. It was used in the fairs as a word descriptive of the strife, noise, and contention that existed in

bartering and trying to get the advantage in exchanging one commodity for another, which was the early mode of trading, and as these noisy marts gave rise to a great deal of the deception, trickery and cheating that may be practised in trade, the word came to be applied also to denote dishonesty in dealing. Thus, we have in the Italian of the period a series of words, expressive alike of, to struggle, to contend, to cheat, to deceive, to barter, to exchange, &c., such as *barratta*, *barare*, *baratto*, *baratare*, *barateria*, *baramento*, &c., and the same peculiarity existed in the Spanish, in the Portuguese, and in the French. Menage relates that there was a cattle fair near Lyons, in France, called the fair of *Char-Barat*, *char* denoting dear or high-priced, and *barat* to cheat; which name, he says, was applied to it, because those who cheated at that fair were not obliged by its regulations to return the animals. (Menage Dict'y Etymologique, &c. *baret*.) The Italian abounds in offshoots of this word of like import, such as *barattiere* corruption, *barattore* a briber, or bribe taker; *baratator* an impostor, *barro*, one who cheats at cards; *baro* a knave, and the Spanish is equally fruitful of words from it of the same kind. (Taboado, Dico Espagnol, &c., Paris, 1838; Velasquez' Spanish Dictionary; Barettis' Italian Dictionary.) In fact, the curious result of this inquiry is, what is frequently illustrated in the history of language, that this word, with its origin so remote, has, during many ages, in the different countries through which it has passed, and amid the many changes in its form, tenaciously adhered to the general signification of the parent words out of which it sprung.

It was first used as a marine term in the Basque; at least the first form of it in that sense, which I have been able to discover, is in that tongue, now one of the oldest in Europe. In the Basque, *bara-baratu* signified delaying a vessel, abandoning her, seizing and giving her over, together with all that followed therefrom, and *baratu-galdu*, stranding, sinking or scuttling her. (Don Pio De Zuaga Dic, by De Larramendi, San Sebastien, 1853.) In the Basque, the original word was *barata*, very little, if at all, changed from the original word in the Sanskrit *bharata*, and the above compounds were formed

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from it. The Basque or Biscayanns were an early maritime people, whose rule and language, at one time, extended across the whole of the north of Spain, from the Bay of Biscay to the Mediterranean, and the Spanish word *barar*, which has the same general marine signification, was, according to the Spanish lexicographers, derived from these compound Basque words (De Zuaga, *supra*). From *barar*, therefore, and from *barata*, which has long been and still is in use in Spanish, came, as I suppose, the Spanish word *barateria*, the meaning of which is best expressed in the Spanish definition of it. *La perdida causada à los duenos de un barco, ò sus asegurores por dolo ò malicia del capitan ò tripulacion* (Velasquez), the loss or damage sustained by the owners of a ship, or insurers, by the fraud, deceit, artifice or wickedness of the captain or the crew. It was probably formed and first used in Catalonia, in connection with insurance, for the Catalan and the Castilian, the languages of Catalonia, have an admixture of Basque words, and the earliest laws respecting insurance that we know of are found in the ordinances of Barcelona, a Catalonian city; a city which carried on an extensive maritime commerce with the south of France and with the countries of the East, from the tenth to the sixteenth centuries, and had a judicial tribunal exclusively devoted to maritime law and usage. (Reddie's Historical View of the Law of Maritime Commerce, p. 3, c. 2, § 6—p. 4, c. 2, § 1.) In its marine sense, the word does not appear, as far as I can find, in the early Italian or French dictionaries, a circumstance strengthening the impression of its Catalonian origin.

In *Lockyer v. Offley* (1 T. R. 269), Justice Willes, who delivered the unanimous opinion of the court, after stating that many definitions of barratry were to be found in the books, said: "Perhaps this general one may comprehend all cases. Barratry is every species of fraud or knavery in the masters of ships by which the freighters or owners have been injured." In the succeeding case of *Nutt v. Bourdien* (1 T. R. 323), Lord Mansfield declared that barratry *must partake of something criminal*, and that it must be committed against the owner of the vessel either by the master or the mariners.

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In *Havelock v. Harrison* (3 T. R. 227), Lord Kenyon simply held that when the master in defiance of his duty took on board certain commodities which subjected the ship to seizure, it was barratry; and in *Ross v. Hunter* (4 T. R. 35), it was decided that it was barratry where the master, after having deviated from his course, left the vessel for a fraudulent purpose, and was never heard of afterward; there being ground for believing that the vessel had been lost. Bullar, J., in that case, said that "barratry was a question of law arising out of facts," that it was *well settled*, and was in one sense of the word "a deviation by the captain for fraudulent purposes of his own," and that that was "the distinction between deviation, as it was *generally used*, and barratry."

This observation of Justice Bullar is important, if the distinction made by him is a correct one, as it tends to show that negligence merely is not barratry. Deviation in the law of insurance, in its general sense, is any change or varying of the risk, without necessity or just cause, by which the risk is enhanced (Phillips on Insurance, §§ 977, 979, 460, 984). It means voluntary acts or acts of neglect, not arising from necessity or just cause, and if it does not come within this exception, it is wholly immaterial with what motive the act which is a deviation or a departure is done; for if, after the risk is assumed, the risk is enhanced or varied, the deviation discharges the policy. This is what Justice Bullar refers to when he speaks of "*deviation as it is generally used*," and the case now before us is a familiar illustration of deviations of this kind, which discharges the policy; for it is well settled that the exposure of the goods in a greater degree to the perils of the sea, by stowing them upon the deck, is an enhancement of the risk which discharges the underwriter, unless he is notified of it before the risk, or it is provided for in the policy, or the article is one which is generally so carried, or must be from its character (*Lenox v. U. S. Ins. Co.* 3 Johns. Cas. 178; *Taunton Copper Co. v. Merchants' Ins. Co.* 22 Pick. 108; *Smith v. Mississippi Fire and Marine Insurance Co.* 11 La. 142; *Brooks v. The Oriental Insurance Co.* 7 Pick. 259; *Blackett v. The Royal Exchange Assurance Co.* 2 Crompt. and Jer. 250; *Creery v. Holly*, 14 Wend. 25;

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Phillips on Insurance, §§ 460 and 985). Now the stowing of the cotton upon deck by the master of the *Victoria* would not, within Justice Bullar's distinction, be barratry, unless it was done by him for some fraudulent purpose of his own, and of this there is no pretense, or anything at least in the evidence that would warrant us in assuming it. In *Moss v. Byron* (6 T. R. 379), cruising by the master of an armed merchantman for prizes contrary to the orders of his owner, was held to be barratry, for the reason that, if any loss or accident had happened to the ship during that time, the owners would have been liable to the freighters. It is not, however, a very satisfactory case, nor very well reasoned. A much more important one is *Pryn v. The Royal Exchange Ass. Co.* (7 T. R. 505), for there the entire bench, Lord Kenyon and Justices Ashurst, Grose and Lawrence, held, that there must be fraud to constitute barratry. Each judge expressed himself to that effect, and the point may be said to have been directly involved, for it was a deviation from the vessel's course, either from ignorance, negligence, or other cause, which led to her capture, and Lord Kenyon told the jury, that it could not be barratry without a fraudulent purpose in the captain at the time, and he left that question, the existence or not of a fraudulent purpose, to the jury, who found that the deviation was owing to ignorance or something else, but that it was not fraudulent; and the court unanimously refused to disturb the verdict. Lord Ellenborough, in the case already cited (*Earle v. Rowcroft*, 8 East, 126), gave as the result of the preceding cases, and what he evidently meant to be a definition, "that a *fraudulent* breach of duty by the master in respect to the owners, or a breach of duty in respect to his owners, with a *criminal intent* or *ex maleficio*, is barratry," and in a subsequent case said, "that the term was large enough to include every species of *fraud* or *malus dolus* committed by the master" (*Boehm v. Combs*, 2 M. & Selw. 172). While in *Todd v. Ritchie* (Stark. 240), in which the vessel, having sprung a leak, put into the bay of Gaspie, where the master, before a *crim.* survey had taken place, broke up her ceiling and bows the *vf* crow-bars, by which the ship was much injured and weakened; an act relied upon as having been done to procure the

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condemnation of the vessel, and, therefore, amounting to barratry, Lord Ellenborough said: "In order to constitute barratry, *which is a crime*, the captain must be proved to have acted against his better judgment," and added, "as the case stands, there is a whole ocean between you and barratry." This, however, was a *nisi prius* case. The facts are not very fully reported, and, without knowing how the case stood upon the evidence, it is not possible to know the exact reasons upon which he relied for non-suiting the plaintiff.

This discrimination is the more necessary, as there are two other cases decided by this eminent judge, which can scarcely be reconciled with this case in Starkie. In *Highman v. Parish* (2 Camp. 149), the captain, contrary to his orders, sailed in a foul wind, having before refused to sail when the wind was fair. He disobeyed the instructions of the pilot, and an anchor having been got out, to prevent the ship from going on shore, he cut the cable and allowed the vessel to drift upon the rocks. Lord Ellenborough said, "that, upon this evidence, it was a clear case of barratry," and Park, for the defendant, having suggested that there did not appear to be any fraud, Lord Ellenborough replied, that that was not necessary; that it had been decided that a *gross* malversation by the captain in his office is barratrous.

In the other case (*Pipon v. Cope*, 1 Camp. 434), the vessel was seized in consequence of the mariners smuggling goods on board, and although this was done without the knowledge of the master, Lord Ellenborough held that it was a clear case of *gross negligence* on his part; and that it was his duty to have prevented the repeated acts of smuggling by the seamen; that, by neglecting to do so, he had allowed the risk to be materially enhanced, and by doing so had discharged the underwriters.

This case would seem to have given rise to the impression that, if the loss arises through an act of gross negligence on the part of the captain, it is barratry (*The Patapsco Ins. Co. v. Coulter*, 3 Pet. U. S. 234; *Lawton v. The Sun Mutual Ins. Co.* 2 Cush. 500; Park on Insurance, 84, 2 Am. ed.) As the correctness of this will be hereafter considered, it may be well here to distinguish precisely what was decided in this case,

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which was simply this: that a master of a vessel cannot recover the insurance under a policy containing a barratry clause, where the loss arose through barratrous acts of the mariners, which might have been prevented by a proper exercise of vigilance on his part.

It will not be necessary to follow consecutively the succeeding English cases, for they all conform substantially to the exposition of barratry given in the decisions that have been examined. The last of these, however, is a very important one (*Gill v. General Iron Screw Collier Co.* Eng. Law Rep. 1; C. P. 600; in error, 3 *Id.* 476), for there a collision arose from the steersman of a vessel starboarding the helm, contrary to the regulations of the merchants' shipping act of 17 and 18 Vict. ch. 104, and although the statute declared that if any damage should arise from the non-observance of the regulations, it should "be deemed to have been occasioned by the *wilful* default of the person in charge of the deck of the ship." The court held that this was not a loss arising from barratry; that it did not appear what was *the extent of the default* in improperly starboarding the helm, which may have been anything from simple negligence to actual malfeasance; that there was therefore no proof of barratry but for the statute, and that the statute was not passed to decide such questions, but merely to regulate ships and the rights of ship-owners, as between themselves.

This case may be regarded as distinctly excluding from barratry what the law denominates negligence, for the judge at the trial, left it to the jury to say whether the collision which caused the loss of the goods was occasioned by the negligence of the defendant's crew, and the jury found specially that there was negligence on the part of the defendant's vessel. As barratry was among the excepted perils in the bill of lading, the defendants insisted that it was error in the judge not to distinguish in this case between *ordinary* and *gross* negligence, upon the assumption, as I infer, that if the collision arose from gross negligence it was barratry, a loss for which the defendants were not answerable. But the court refused to disturb the verdict upon any such ground, holding that *gross* in connection with negligence was a mere word of description, and not a definition, and

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that no meaning could be attached to it in connection with the case before the court.

Lloyd v. The same defendants (3 H. & Colt. 284), was a case arising also out of the same collision, which came before the Court of Exchequer upon the pleadings. The averment in the declaration there was that the collision and consequent injury was caused by and through the *gross carelessness*, negligence, mismanagement, and improper conduct of the defendants, their servants and *mariners*; an averment upon which the defendants relied, as showing that the loss was within the excepted perils, one of which was "barratry of master or mariners;" but the court held, in effect, that it was an averment of a loss by negligence, and not by barratry; Bromnall, J., distinguishing that there might be wilful negligence and yet not barratrous; that barratry implies a secret and fraudulent act against which the ship-owner cannot guard; whereas negligence may be prevented by employing a skilful master and proper mariners.

The cases in our own State are to the same effect. In *Grim v. The Phœnix Ins. Co.* (13 Johns. 451), the vessel being, as in the case now before us, fully laden, 36 kegs of gunpowder were stowed in the cabin, close up to the companion way, the plank of which toward the binnacle being but half an inch thick, and the plank of the binnacle but an inch thick. The candle in the binnacle, having burnt down to the socket on a stormy night, and the socket being too hot to put another candle in it immediately, a seaman, as it was blowing hard at the time, stuck the candle temporarily against the side of the binnacle, which, within twenty minutes, set the binnacle on fire, and before the fire could be extinguished, the vessel blew up, killing every one on board, except one passenger. Here there was negligence on the part of the master in stowing the gunpowder close up to the companion way adjoining the binnacle, where a lighted candle was kept constantly throughout the night, and gross carelessness in the seaman, whose act was the proximate cause of the destruction of the vessel. The negligence of the master in that case was of the same general character as the negligence of the master in this. It was an act of improper stowage, and was, like the negligence in this case, the

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remote, though not the direct, cause of the loss; the direct cause here being the jettison, and there the fire. Barratry was one of the perils insured against, and it was claimed that the negligence there established, as it is claimed that the negligence here establishes, a loss by barratry. Indeed, that case was even stronger than this, for there the negligence of the mariner cooperated with the previous negligence of the captain in bringing about the loss. But the court said that it was "impossible to consider the negligence by which the loss was occasioned as amounting to barratry;" that it was "well settled that an act to be barratrous must be done with a fraudulent intent or *ex maleficio*." In *The American Ins. Co. v. Bryan* (26 Wend. 578), Senator Verplanck said, that barratry must mean and include all fraud, knavery, breach of trust, or *other criminal conduct* of the master or mariners, whereby the owner or freighter suffers loss, or the subject insured is destroyed; and Chancellor Kent, in his commentaries, defines it, to the same effect, but more precisely, as meaning "fraudulent conduct on the part of the master, in his character as master, or of the mariners, to the injury of the owner, and without his consent, and includes every breach of trust committed with dishonest views" (3 Kent's Com. 4th ed. 305).

It is clearly deducible, from these cases, that a loss arising from what in law is denominated negligence is not barratry. But Justice Johnson declared, in *Patapsco Ins. Co. v. Coulter* (8 Pet. U. S. 234), that negligence itself, when gross, is evidence of barratry. Park, in his work on insurance, says, that any act of the master or mariners, which is grossly negligent, tending to their own benefit to the prejudice of the owners of the ship, and without their consent and privity, is barratry (Park on Insurance, 2d Am. ed. 84). Chief Justice Shaw says, in *Laroton v. The Mutual Ins. Co.* (2 Cush. 500), that the act must be wilful and not caused by negligence, unless the negligence be so gross as to amount to fraud, and Phillips includes in the general definition of barratry, very gross and culpable negligence in the master or mariners, contrary to their duty to the owner, and that might be prejudicial to him or to others interested in the voyage or adventure (1

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Phillips on Insurance, 1062). This has led to a renewed misapprehension of barratry, by coupling negligence with it. The effect of using such a term as "gross negligence" is to mislead; for in the science of the law there is no such thing as degrees of negligence. There may be degrees of care, as more care is required in certain cases than in others, and it has become the habit to distinguish between slight, ordinary and great care; but, whatever may be the degree or amount of care demanded in the particular instance, it is the neglect to bestow it which is expressed in the law by one word, "negligence." (See the cases cited in Am. Law Review, vol. 5, pp. 39, 40.)

The legal meaning of negligence has, in a recent elementary work (Shearman and Redfield on Negligence, ch. 1), been comprehensively and very accurately defined, as including every breach of trust not clearly *intentional*, as signifying the want of care, caution, attention, diligence or discretion in one having no positive intention to injure; consisting either in the careless performance of obligations assumed by contract, or the neglect of those which are imposed by law; and barratry, as has been shown, means much more than this. As a marine term, it means an intentional injury to the vessel or to the cargo; or some unlawful, fraudulent, or criminal act, whereby, or in the prosecution of which, loss or injury arises to the owners of the vessel, or of the cargo, or to the insurers, and does *not* embrace what in the law is denominated negligence. So far, therefore, as the plaintiffs seek to recover under the policy, for a loss arising from barratry, this action cannot be maintained.

It is now settled in the law of insurance, that if the proximate cause of the loss was the peril insured against, and the remote cause was some act of negligence on the part of the master or of the mariners, the underwriters are liable, as where fire is one of the perils insured against, and the fire which produced the loss is attributable to an act of negligence in the master or any of the crew. (See the cases collected in Phillips on Insurance, § 1096.) Here the proximate cause was the jettison, and the remote one the negligence of the master, in stowing the cotton upon deck, and a loss by jettison was one of the perils insured against. But I do not understand that

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this rule applies where there has been a deviation or departure, producing a change of risk so material as to discharge the underwriters from the policy ; for where they insure goods upon a clean bill of lading, there is an implied warranty that the goods are or will be stowed in the usual and ordinary manner, which is in the vessel's hold, and if this is not done, but the goods are carried on deck, except in a case where that is justifiable, the policy never attaches, for the reason that it is a greater risk than the underwriter agreed to take (1 Phillips on Insurance, §§ 460, 686, 704 ; 1 Arnould on Insurance, 213, Am. ed. ; *Lennox v. The U. S. Ins. Co.* 1 Johns. Ch. 178 ; *Smith v. Wright*, 1 Car. 44 ; *Wolcott v. Eagle Ins. Co.* 4 Pick. 429). Goods carried upon deck are not within the protection of the policy, nor can there be any claim for contribution upon a general average, if they are jettisoned, except in the cases where they are generally or must necessarily be so carried ; or where it is done with the knowledge and implied consent of the underwriter, which was not the case here.

The plaintiffs, therefore, have no cause of action against the underwriters upon the policy. The only remedy is an action against the master or his principal for the damages sustained through the negligence of the master in carrying the cotton upon deck.

The verdict, therefore, should be set aside, and a new trial ordered.

Judges ROBINSON and LARREMORE concur.

New trial ordered.

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JACKSON S. SCHULTZ AND OTHERS v. EDSON BRADLEY.

Defendant, having agreed to purchase a certain number of hides of plaintiffs, at a fixed price, accepted a delivery, but afterwards alleged that a part of them were of an inferior quality to that contracted for, and requested plaintiffs to take them back. Plaintiffs denied that the hides were inferior to the contract quality, but took them back as requested, and examined them, and having satisfied themselves that they were of the proper quality, tendered them again to the defendant, who refused to receive them.

Held, a sufficient part delivery to take the case out of the statute of frauds.

Held further, that plaintiffs, by taking back the hides, did not rescind the contract, or give an acquiescence to defendant's rejection of them amounting to a rescission, and that the hides being of the proper quality, they were entitled to recover damages for defendant's refusal to fulfil his contract.

In such a case, *Held*, that plaintiffs might sell the goods at private sale, and without notice to defendant; and, provided the sale was a judicious one, could thereafter recover from defendant the difference between that price and the contract price.

APPEAL by the defendants from a judgment entered on the verdict of a jury at trial term.

The action was brought to recover damages for a refusal to take and pay for certain goods.

The facts are as follows :

In December, 1864, an agreement was entered into by the parties to this action, for the sale and purchase of 10,000 sides of oak wax leather, memoranda of which agreement were signed and exchanged. By the terms of sale, 3,000 sides were to be delivered at once, and paid for in thirty days, the residue to be delivered as fast as finished, from 100 to 150 sides daily, commencing January 15, 1865.

After plaintiffs commenced the delivery of the 3,000 sides, defendant requested that 5,000 additional sides should be added to the contract, which was done by plaintiffs' writing the same on said memoranda of sale, in presence of the defendant.

On February 24th, 1865, the deliveries of leather by the plaintiffs amounted to 6,365 sides.

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About this time a misunderstanding arose as to the quality of the leather, and time of delivery. No further deliveries were made until March 29th, 1865, when, from negotiations had, a new arrangement was made between the parties, whereby it was verbally agreed, that the whole number of hides to be sold and delivered should be reduced from 15,000 to 12,000, the limitation as to time waived, and additional facilities of payment offered.

The plaintiffs then resumed the delivery of said leather, and by the 8th of April, 1865, had delivered 5,635 sides, in addition to the 6,365 sides previously delivered, making the 12,000 called for by said new agreement.

On April 12th, 1865, defendant (by letter of that date) complained of the quality of the leather, and subsequently rejected the whole 5,635 sides, and notified the plaintiffs to take them away. This was done by the plaintiffs, without admitting the position of the defendant as to the quality of the articles so rejected. The said hides were taken to plaintiffs' store, re-examined, found by them to be good in all respects, and the same were again offered and retendered to the defendant, who refused to receive them. Shortly after the market fell, and the leather in question was, on the 5th of September, 1865, sold by the plaintiffs at 20 cents a foot. For the damages caused by such depreciation in value, and defendant's refusal to take, judgment was rendered for the plaintiffs for \$9,649 46, from which this appeal is taken.

Alvin C. Bradley, for appellant.

I. Plaintiffs, by sending for and taking away the rejected hides, waived their right to maintain an action (*Lord v. Kinney*, 13 Johns. 219; *Healey v. Utley*, 1 Cow. 345; *Coon v. Reed*, 1 Hilt. 511; *Callins v. Brooks*, 20 How. Pr. 327; *Mallory v. Lord*, 29 Barb. 454; *Shindler v. Houston*, 1 N. Y. 261; *Rogers v. Phillips*, 40 Id. 519; *Sands v. Taylor*, 5 Johns. 395; *Bement v. Smith*, 15 Wend. 493; *McEachron v. Randalls*, 34 Barb. 301; *Pallen v. Le Roy*, 30 N. Y. 549).

II. The contract was void by the statute of frauds, and

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defendant had a right to reject the hides (*Champion v. Plummer*, 5 Est. 240; 4 B. & P. 253, per Mansfield, C. J.; 3 Pars. on Cont. (5th ed.) 13, note (v); 1 Greenl. on Ev. § 268, n. (4); 2 Ph. Ev. ch. 7, p. 84, C. & H. 2d 4 Am. ed.; *Bailey v. Ogden*, 3 Johns. 399).

William M. Evarts, for respondents.

I. The statute of frauds does not apply to the transaction between the parties. The agreement was for the purchase of an article to be manufactured, and, therefore, not within the statute of frauds (*Mead v. Cose*, 33 Barb. 202; *Donovan v. Willson*, 26 Id. 138; *Robertson v. Vaughn*, 5 Sand. 1; *Sewall v. Fitch*, 8 Cow. 215; *Crookshank v. Burrell*, 18 Johns. 58).

II. If the statute of frauds applies, there was a delivery and acceptance of a portion of the hides, which renders the contract valid (*Sale v. Darragh*, 2 Hilt. 184; *Boutwell v. O'Keefe*, 32 Barb. 434; *McKnight v. Dunlop*, 1 Seld. 537; *Sprague v. Blake*, 10 Wend. 61).

III. The sending for and taking away of the 5,635 sides, neither did away with the acceptance of such as the defendant had previously accepted, nor did it amount to a rescission of the contract. It was done with the intent of re-examining the hides, to see if the defects complained of really existed. When it was found that the complaint was unfounded, the plaintiffs did all they could to restore the goods to the custody of the defendant (*Smith v. Lynes*, 5 N. Y. 41, 45).

IV. When defendant refused to receive the leather, plaintiffs had a right to sell it (*Sands v. Taylor*, 5 Johns. 395; *Bement v. Smith*, 15 Wend. 497; *Crooks v. Moore*, 1 Sandf. 297; 2 Pars. on Cont. 453; *McLean v. Dunn*, 4 Bing. 722; *Gerard v. Taggart*, 5 Serg. & R. 19); and no notice to defendant of time and place of sale was necessary (*Pollen v. Le Roy*, 30 N. Y. 549).

LARREMORE, J. (after stating the facts).—It will hardly be claimed that the contract in question is within the statute of frauds. It calls for the delivery of an article to be manufac-

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tured (*Mead v. Case*, 33 Barb. 202, and cases there cited; *Donovan v. Willson*, 26 Barb. 138).

But even if this were not the case, there was a delivery of a portion of the hides, in pursuance of the verbal agreement of March 28th, 1865, on the day it was made, and the residue in a short time thereafter. The jury have found that there was an acceptance by the defendant, and such finding, upon the evidence offered, must be regarded as conclusive. The subsequent delivery and acceptance of the hides by the defendant was sufficient to take the case out of the statute (*McKnight v. Dunlop*, 5 N. Y. (1 Seld.) 537; *Sale v. Darragh*, 2 Hilt. 184; *Sprague v. Blake*, 20 Wend. 61).

The retaking of the property by the plaintiffs, for the purpose of re-examination as to its quality, was not a rescission of the contract, and the jury have found this to be the fact.

There can be no doubt of the plaintiffs' right to sell the property, after a refusal by defendant to receive it (*Sands v. Taylor*, 5 Johns. Rep. 395; *Bement v. Smith*, 15 Wend. 497; *Crooks v. Moore*, 1 Sand. 297; 2 Parsons on Cont. 453). There does not appear to have been any unfairness about the transaction. The sale was made on a rising market, in the regular course of business, and for full value, and no notice of the same to defendant was necessary (*Pollen v. Le Roy*, 30 N. Y. 549).

The case was fairly submitted to the jury, and the judgment entered on their verdict should be affirmed, with costs.

JOSEPH F. DALY, J.—It does not seem to me that there was any rescission of the contract of sale between the parties as to the 5,635 sides of leather in question. The defendant had no *right* to disaffirm the contract and reject the goods, since it appears that they were not inferior to the quality agreed to be furnished. The jury found this fact under the charge, and the evidence is sufficient to sustain the finding. The question, therefore, is, was there an agreement between the parties to rescind, or an acquiescence by the plaintiffs in defendant's rejection of the goods, amounting to rescission?

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The evidence on the point is, that the plaintiffs had always told the defendant to send back what was not right, to reject inferior leather, and they *would take it back*; that while the leather was in course of delivery, and under date of April 12th, the defendant wrote to the plaintiffs: "I have examined some of the wax leather sent in on the last bills, and I notify you thus early that if this is a sample of the lot, I will not receive the leather, but hold it subject to your order." On April 15th, the defendant again wrote to plaintiffs: "Of the 5,635 sides wax leather sent me, I have examined sufficient to satisfy me that the leather is not of the quality which you agreed to furnish me. I, therefore, reject the entire lot, and request you to take it away as early as possible." The plaintiff Schultz, who had been absent from the city, found these letters on his return. He wrote under date of April 21st, on behalf of plaintiffs, to the defendant: "We are in receipt of your two letters of the 12th and 15th. We are, of course, surprised at your statement. We do not and cannot admit the position you take. But, by your request, we will send and take the leather away. You will, therefore, please deliver the leather, or such portion as you reject, to our cartmen when they call." The plaintiffs sent to defendant's, got the leather, took it to their store, opened and examined it, found it good, and equal in all respects to the best they had manufactured, and tendered it back to defendant. On April 29th, they wrote to defendant, * * * "We have re-examined the leather referred to in your letters of the 12th and 15th of this month, and are satisfied of the incorrectness of your position, and we shall insist upon your receiving it according to the agreement. We now offer to return it to you. Please advise us by the bearer, or otherwise, if you will accept it." On May 1st, the defendant wrote to the plaintiffs, * * * "As to your examination of the leather rejected by me, and taken away by you, I am sure my course is correct, and shall be governed accordingly."

It cannot be claimed that the foregoing shows any agreement to rescind the contract of sale of the 5,635 sides. The essence of such an agreement is the same as of all agreements ;

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the minds of the parties must meet, there must be perfect acquiescence; they must consent as fully to the canceling of their contract, as to the making of it originally. It will hardly be argued that the parties concurred when the letter of plaintiffs of the 21st April expressly says: "We do not and cannot admit the position you take;" and it is certain that there is no evidence that plaintiffs admitted the defendant's rejection to be proper, or agreed to receive the leather back for that reason. What, then, was their object in retaking it? They had stipulated with defendant that he might reject what was of inferior quality, and they would take it back. It is clear that this agreement to take back was conditional upon the goods being of inferior quality. Pursuant to it, the defendant notifies his rejection of the whole 5,635 sides; pursuant to it the plaintiffs take them back. Under the condition, it is the right of the plaintiffs to be satisfied that the rejection is according to the stipulation; they examine, and find the leather good in all respects. If they have been tricked into taking it back, or if mistake on the part of defendant caused the rejection, are the plaintiffs without remedy? Clearly not, when the only act which can be construed against them—the taking back the leather—was conditional merely, pursuant to an agreement between them, and usage in their dealings as to rejection of goods. There was no unnecessary delay in the re-examination by plaintiffs; eight days for the examination of 5,635 sides cannot be deemed unreasonable, and it nowhere appears that the defendant was prejudiced by delay. If the question of intent in the retaking of the goods was a proper one for the jury, it was fully submitted to them, and they found in favor of plaintiffs.

The judgment should be affirmed.

ROBINSON, J. [*dissenting*]. Conceding that the agreement relating to the 5,635 sides of leather in question was not obnoxious to the provisions of the statute of frauds, the defendant was not liable for the damages which have been assessed against him for the assumed difference between the price he agreed to pay and that realized by the subsequent resale to Johnson and

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Thompson, or upon any evidence establishing any basis for a recovery.

It clearly appears he rejected the leather as not of the quality called for by the contract, that with notice of such rejection, and in compliance with his request, plaintiffs sent by their carman and took the leather away. Their letter on this subject, in reply to those of the defendant rejecting the leather for alleged non-conformity to sample and requesting them to take it away, stated that they were surprised at his statements and did not admit the position he took, and added, "but by your request, *we will send and take the leather*. You will therefore please deliver the leather, or such portion as you reject, to our carmen when they call."

Five days after plaintiffs' carmen had taken away all the leather, they wrote defendant that they had re-examined it, and were satisfied of the incorrectness of his position, and insisted on his receiving it according to the agreement, and offered to return it to him.

In his reply, he claimed his course was correct, and stated he would be governed accordingly. Again, on the 8th of June following, they made tender of the same 5,635 sides, which was refused.

In their complaint, plaintiffs allege their resumption of the leather was *with the design* of examining said leather and ascertaining with certainty its quality. If so, they disclosed no such purpose nor in any way qualified their resumption of the goods, as rejected and in accordance with defendant's request, except by stating they *did not admit the position he took*, although they *did* just what he required.

The answer denied any such qualified resumption, and I cannot discover a *scintilla* of proof to sustain their assertion that the goods were merely taken for the purpose of re-examination. Such a position could only be sustained by evidence of some declaration made at the time, qualifying the character of their resumption, or upon some proof of a usage or course of dealing between the parties evincing such a *latent* intent.

None such was disclosed, nor is any reason suggested why, if a mere re-examination was intended, it could not have been

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made before removal of the goods from defendant's warehouse, as had been done on other occasions. In the two other instances of previous rejection of such goods by the defendant, disclosed by the testimony, to wit, as to 135 sides returned in October, and a lot of 560 returned in January, the 135 and 140 (out of the 560) were sold to other parties, and 420, balance of the latter lot, were resold to defendant.

In most instances (four or five other times) where objections were made, plaintiffs were sent for, "Mr. Schultz would come down and make it right." Mr. Schultz testifies, "I told defendant when we gave him leather inferior to the contract, if he would reject it, we would take it." "I told him uniformly to send back what was not right." "I examined leather on two or three occasions in defendant's loft."

From these extracts from the evidence (which, so far as I can discover, are substantially all affecting this question of *latent* intent of the parties, as distinguished from the legal import of their acts and correspondence), there can be no pretense that the possession of this property was resumed for mere purpose of re-examination, either in pursuance of any express agreement or understanding, or as implied from well understood course of dealing between the parties.

The rejection of it as not conforming to sample, the acquiescence in and agreement with the request of the vendee to take it back (but not in his assertion that it did not conform to sample), the sending for it and resumption of possession without any intimation of any such intention were unequivocal acts of a complete resumption of the property for any general purpose of their own, whereby they were reinstated in absolute ownership, without prejudice to their right to claim they have made a tender of performance.

A vendor, on the unjustifiable refusal of the vendee to accept, has his election either to recognize the rejection and claim as damages the difference in his favor between the market price of the goods *at the time* of their rejection and that agreed to be paid for them, or he may assume an agency to sell them on account of the vendee. In the exercise of such agency he is only bound to use due care and diligence, and may, in making

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a disposition of the goods, give notice to the vendee of the time and place of sale, and is relieved from responsibility in respect to any inadequacy of price obtained thereon, but without giving such notice he is only liable for the judicious exercise of his authority in making any sale.

But the notice to the vendee as to the character in which he intends to hold or deal with the property, presents a further consideration material to the rights of the parties beyond such as merely affects the measure of damages arising out of a resale of the goods.

The notice to the vendee of the intention to hold as his agent, affords him a "*locus poenitentiae*" and opportunity to provide against further contingencies, which would not exist if the vendor, upon such rejection, resumed ownership.

If no such notice be given, the retention or sale of the property by the vendor must, from these considerations, operate as an election to hold it as his own.

The decisions of our courts present several analogous cases, and clearly exhibit the law applicable to these facts.

In *Lord v. Kenny* (13 Johns. 219), plaintiff had agreed to sell defendant a horse, and received his note for the price. It was afterwards agreed that the purchaser might, within a reasonable time, return the horse, if in as good condition as when delivered, and receive back his note. Defendant accordingly delivered it back, and plaintiff received it without objection as to its condition, and gave back the note, but afterwards brought an action on the ground the horse was not returned in as good condition as when sold; but the court held that as the deterioration in the value was not on account of any secret injury, and as the plaintiff took back the horse and delivered up the note without objection or reservation as to the condition of the horse, he was concluded by that act, and the contract of sale was thereby rescinded.

In *Healy v. Utly* (1 Cow. 345), the vendee after delivery of the articles sold, returned them to the vendor, saying he could not pay for them, and the *vendor must do the best he could* with them. The vendor resold them, but for less than the original price. It was held, that acceptance of the articles by the vendor

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was a complete rescission of the sale, and he could not be deemed the agent of the vendee in making the resale, or hold him for the difference.

In *Coon v. Reed* (1 Hilt. 511), the purchaser of a horse with warranty of soundness, after delivery but before payment, refused to complete his purchase, alleging the horse was lame. The seller refusing to take the horse back, and it was sent to a livery stable, from which it was taken by the seller two or three weeks afterwards. It was held, that notwithstanding such refusal, the subsequent taking possession of the horse constituted a rescission of the contract of sale, and no recovery could be had for the loss sustained by the failure of the purchaser to complete the contract. To the same effect is also *Collins v. Brooks* (in this Court), 20 How. Pr. 327.

The question as to the rights of the parties under the circumstances stated, were distinctly presented on the motion to dismiss the complaint, and exception was taken to the overruling of the objection to a recovery. The plaintiffs also made these 5,635 sides of leather their own by their sale to Johnson & Thompson, without any notice to defendant of their intention to hold or sell them on his account.

In *McEachron v. Randles* (34 Barb. 801), it was held that the right of the vendor to resell the goods on account of the purchaser, and recover of him the loss by the resale (where there was no express stipulation in the contract of sale, authorizing it) could only be exercised after due notice to him of the time and place of resale (p. 807).

The Court of Appeals, subsequently, in *Pollen v. LeRoy* (30 N. Y. 555), held that "the vendors had a right to dispose of the lead (the property sold) as soon as they could, with due regard to the interest of the vendees, and *after having given notice of their intention, and to hold the latter responsible for the difference* between the agreed price and the sum realized, together with all expenses necessarily incurred;" but further notice of the time and place of sale was held unnecessary, and *McEachron v. Randles*, as far as it so held, was expressly overruled.

The main proposition presented by these cases requiring

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notice by the vendor, where he elects to hold goods on account of the vendee, was previously asserted in *Sands v. Taylor*, 5 Johns. 395; *Bement v. Smith*, 15 Wend. 493; *Crooks v. Moore*, 1 Sand. S. C. 297; *Mallory v. Lord*, 29 Barb. 465, and other cases.

In the absence of such notice and his consequent election to treat the goods as his own, his damages are confined to the difference between their market price on the day of performance and that agreed to be paid (*Dey v. Dox*, 9 Wend. 129; *Stanton v. Small*, 3 Sand. S. C. 230; *Dana v. Fiedler*, 12 N. Y. (2 Kern.), 41; *Orr v. Bigelow*, 14 N. Y. (4 Kern.), 556; Sedg. on Dam. 282).

This point was also distinctly presented as a ground for non-suit, and the decision overruling it was excepted to.

The latter agreement between the parties for the delivery of 12,000 sides, under which the 5,635 in controversy were sent to and receipted for by the defendant, was not void under the statute of frauds. It is true, it originated in the written memoranda signed by the parties in 1864, somewhat in the form of "bo't and sold notes" for a sale of 10,000 sides at 28 cents per pound (3,000 to be delivered at once, at 30 days, and the balance as finished, say 100 to 150 daily), which were so imperfect in describing who were vendors or vendees, that they failed to express intelligently or with certainty any such agreement as the statute required (*Wright v. Weeks*, 25 N. Y. 153). This contract, then existing only in parol, was subsequently modified by enlarging it by 5,000 sides to be delivered the 15th of April, but such modified agreement, although reduced to writing, was only signed by plaintiffs. Afterwards and about February 24th, when but 4,000 sides had been delivered, the parties again by parol modified this latter agreement so as to reduce the total amount of leather to be bought and sold, to 12,000 sides. As applicable to this contract, 6,365 sides in all had been delivered prior to March 29th, which have been fully paid for. The controversy is, as to 5,635, the balance of the 12,000 sides which were delivered on and after March 29th and previous to April 15th, in pursuance and part performance of the subsisting modified parol agreement for the sale and delivery of 12,000 sides.

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Although there was no sufficient writing to render it valid in its inception, as a sale of 12,000 sides, the delivery, acceptance and receipt of a part thereof (at least 2,365) and the payment therefor, satisfied the statute (2 R. S. 136, § 3, sub. 2 and 3); and if the claim for these 5,635 sides were otherwise maintainable, the objection taken under the statute of frauds would constitute no defense.

The acquiescence by the plaintiffs in defendant's request that they should take away the 5,635 sides ("without assenting to his position" that they did not conform to the sample), left them in a position to show that they had tendered performance according to the requirements of the contract, and, notwithstanding their subsequent sale of the property, they might recover from defendant damages for his refusal to accept it, estimated upon its inferior market value, when tendered and rejected, to that he had agreed to pay for it.

The case was, however, tried upon another theory, and with reference to such damages as resulted from the subsequent sale of the property to Johnson & Thompson, in September following.

No proof whatever was given of any difference between the market value of the property, when rejected and taken back, and the price agreed upon in the contract, and nothing but nominal damages could be allowed.

Under these views there was error in the submission to the jury of the several questions as to which there was no conflict of evidence:

1st. Whether the buyer had accepted the goods.

2d. Whether the plaintiffs had agreed to take the property back.

3d. Whether plaintiffs took back the property for examination.

4th. In the charge to them that the vendee must pay the difference between what the article afterwards sold for and the amount which, by the contract, he agreed to pay for it.

5th. And without adverting to the necessity of giving notice of an intention by the vendor to hold and sell the property on the vendee's account, and the charge that the vendee must pay the

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difference between what the article afterwards sold for and the amount which, by the contract, he agreed to pay for it.

The verdict was evidently predicated upon no other evidence than a contract of the price obtained on the sale to Johnson & Thompson, in September following, with that agreed to be paid for fifteen days after delivery.

The judgment should, for these reasons, be reversed, and a new trial ordered, with costs to abide the event.

Judgment affirmed.

THE INDIANA NATIONAL BANK v. SAMUEL COLGATE AND,
CHARLES C. COLGATE.

Where a party orders goods to be shipped to him, and directs the vendor to draw upon him at sight, and attach the bill of lading to the draft, this direction is evidence that the title in the goods is not to pass to the purchaser until the draft is paid.

When goods are shipped or afloat the bill of lading represents them, and the indorsement and delivery of it has exactly the same effect as the delivery of the goods themselves, when the intention is to transfer thereby the title to the goods or to pledge them by way of security for advances made or otherwise.*

The owners of goods at Indianapolis, having forwarded them to New York, consigned to defendants, who were their factors, for sale, made a draft on defendants on account of the goods, and before delivery of the goods to defendants, induced plaintiff to discount the draft by indorsing and delivering to it the bill of lading; *Held*, That this operated as a valid pledge of the goods to plaintiff, and upon the failure of the defendants to pay the draft, plaintiff was entitled to demand of them the goods, or in case they had sold them, to maintain an action for the proceeds of the sale as money received to plaintiff's use.

APPEAL by defendants from a judgment of this court entered on the report of a referee.

* See, to the same effect, *Marine Bank v. Wright*, 48 N. Y. 1.

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This was an action by the plaintiffs against the defendants, who were doing business in New York city, under the firm name of Colgate & Co., to recover the amount of a draft for \$6,000, drawn on the defendants, with five per cent. damages, according to the laws of Indiana. The draft had been drawn by H. W. Comstock, of Indianapolis, against the proceeds of 200 tierces of lard consigned to defendants by Culton & Sprague, of Chicago, for account of H. W. Comstock, and had been given to plaintiffs with the bill of lading of the lard attached by way of security.

The defense was that the 200 tierces of lard in question had been consigned to defendants as part of a lot of 500 tierces agreed to be consigned to them by the firm of H. W. Comstock & Co., as security for advances made and to be made, and in consideration of the acceptance by the defendants, of H. W. Comstock & Co.'s draft for \$3,500, and that when the draft for \$6,000 was presented to them, they had not sufficient funds in their hands belonging to H. W. Comstock & Co., to pay the same.

The case was referred to a referee, who found, as matters of fact, that on August 17th, 1867, the firm of Culton & Sprague, of Chicago, Ill., shipped 200 tierces of lard consigned to defendants at New York city, for account of H. W. Comstock, and took a bill of lading therefor. On August 24th, 1867, H. W. Comstock, at Indianapolis, made a sight draft on Colgate & Co. for \$6,000, and said draft, indorsed by H. W. Comstock & Co., and with the bill of lading attached (the bill of lading had been obtained by H. W. Comstock & Co., by the means described in the opinion), was discounted by plaintiffs, who paid full value therefor.

The defendants were the factors, in New York, of H. W. Comstock & Co., and had made advances to them on goods consigned for sale.

About August 28th, 1867, the defendants came into possession of the 200 tierces of lard, and on the same day sold them for \$8,327 59, which they collected on August 30th, following.

On August 29th, and again on the 30th, the draft for \$6,000

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was presented to defendants, who refused to pay it, and it was protested for non-payment.

The referee also found that defendants had not proved that H. W. Comstock & Co., at the time of presentation to them of the draft and bill of lading attached, were indebted to them in any sum whatever, for any advance therefor made by them to H. W. Comstock & Co. That the draft for \$3,500, mentioned in the answer of the defendants, and accepted by them, had been fully paid to them by the proceeds of sale of other property consigned to them by the said H. W. Comstock & Co. That the defendants had not proved that the said 200 tierces of lard were conveyed to them upon any such agreement as was alleged by them. Upon these facts, the referee decided that the plaintiffs, by the delivery to them of the bill of lading, became the *bona fide* purchasers thereof, and acquired the legal title thereof and to the property mentioned therein, as security for the amount due them for the \$6,000 draft, and that the defendants were liable for so much of the proceeds of the lard as was necessary to pay the draft with interest, and the five per cent. damages allowed by the laws of Indiana.

He gave judgment for the plaintiffs accordingly, and defendants appealed.

Luther R. Marsh, for appellants.

I. The lard, being consigned to the defendants, they were presumptively the owners, and entitled to the possession thereof (*Price v. Powell*, 3 N. Y. 322; *Green v. Clarke*, 12 Id. 843; *Sweet v. Barney*, 23 Id. 335; *Grove v. O'Brien*, 8 How. U. S. 429).

II. The lard, being received and sold by defendants before any notice was given to them of defendants' draft, they are not liable (*Story on Agency*, § 376; *Harris v. Clark*, 3 N. Y. 93; *Copperthwaite v. Sheffield*, Id. 243; *Winter v. Drury*, 5 Id. 525).

The action should have been brought for the conversion of the lard, and not on the draft.

John Sessions, for respondents, relied on *Bank of Rochester v. Jones*, 4 N. Y. (4 Coms.) 497.

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BY THE COURT.*—DALY, CHIEF JUSTICE.—The referee has found that the 200 tierces of lard in controversy were not shipped by Comstock & Co. to the defendants as parcel of a lot of five hundred tierces, the possession of which was to be transferred by them to the defendants in consideration of their having accepted and paid Comstock & Co.'s draft against the shipment of \$3,500, and I see no ground upon the evidence that would warrant us in disturbing the finding.

The defendants, by their letter of August 17th, 1867, advised Comstock & Co. that they, the defendants, were anxious to clear up the old business and pay over the balance to Comstock & Co.'s agents here, but that until 550 tierces should arrive, they could not do so, as Comstock & Co.'s *shipments* did *not complete themselves* until then. Upon the 19th of August, Comstock & Co. wrote the defendants that they wanted a statement to enable them to settle with the railroad company, and to know whether to draw against 300 tierces shipped to the defendants, Friday, August 17th, and advise them of 200 tierces ordered for them from Cincinnati, that day, August 19th. The defendants claim that the 300 tierces referred to in this last letter include the two hundred in controversy, the whole being sent in two shipments on August 17th, 1867, and which, with the two hundred referred to in the letter, as ordered from Cincinnati, would make up 500 tierces.

The following day, August 20th, 1867, Comstock & Co. telegraphed the defendants that they had drawn that day upon them for \$3,500 against a shipment of 500 tierces. On the 22d of August, 1867, the defendants answer that they inferred from the telegram, and that Comstock & Co.'s letter, in fact, stated, that they had shipped 500 tierces, and express their surprise to find the draft for \$3,500 with a security of only 100 tierces shipped, attached to it, and they refer to the difficulty mentioned in Comstock & Co.'s letter of the 19th of August, 1867, between them and the railroad company, and to the fact that considerable uncertainty existed about the shipment of 300 tierces for which the company had issued bills of lading,

*Present, DALY, CH. J., and LOEW and J. F. DALY, JJ.

&c., and state that they have telegraphed for an explanation, which they await. They express the hope that Comstock & Co. will have no trouble with the party who sold them the lard, and which, they say, has apparently not been shipped. This draft, it would appear, they accepted; but they did so with a knowledge that there was a difficulty in respect to 300 tierces, and with the impression that they had not been shipped. They had then received a bill of lading for only 100 tierces; and that they had not made this advance upon any indicia that title to any greater amount would or did by that acceptance pass to them, appears from the fact, that they did not know that any greater amount had been shipped to them, which is shown by what has been already stated, and the further observation in their letter, that the railroad company would "bring themselves into a very troublesome position by signing bills of lading before they assume control of the stock purported to be shipped," and that their bills of lading had been used by Comstock & Co. in drawing upon the defendants. The defendants anticipated that a shipment would be made to them of 500 tierces, and when the telegram referred to was received, and they may have thought that that quantity was actually shipped; but Comstock & Co.'s letter of August 19th, 1867, advised them that there was a difficulty. It was in part in these words: "We are in an unpleasant fix with the railroad company about our shipments of lard, and only the statement of receipts by you asked for in ours of some days since, will enable us to set the matter right. We have bought and claim to have delivered to the company about 300 tierces more lard than they are willing to acknowledge having received. One thing is absolutely certain, we have had their B. of L. (Bill of Lading), and *have used it* in drawing upon you, and if R. R. Co. have not received the lard you have not, and we have a fair prospect of 'muss' with the seller, and while you have advanced on lard that has not been forwarded. We want your statement for two grand reasons: one is to enable us to settle with the R. R. Co., and the other that we may know whether to draw anything against 300 tierces lard shipped you from Chicago last Friday (August 17, 1867), and 200 ordered to you from Cin. to-day. If you have not sent

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the statement asked for, you will see that it is important that we should have it, and as soon as possible."

The defendants had sent the statement the day of the date of this last letter, and the 34th item in it was an acknowledgment of 300 tierces to Comstock & Co., and it was dated the 19th of August, 1867, and the arrival of which was under the head of August 17th.

This letter of August 17th advised the defendants that Comstock & Co. had used the bill of lading in drawing upon them, the plain purport of which obviously is that they had used it to get the draft drawn upon them discounted, and that there was a difficulty with the railroad company, who, though they had given the bill of lading, were not willing to acknowledge that they had received the full amount which it covered, and hence the defendants' surprise when they received the draft with only a bill of lading attached to it for 100 tierces. They asked, as I have said, for an explanation, and the reply by telegram was in these words: "At time draft was made, had no other bill. Two hundred more shipped next day; we send you that bill." And in a letter which followed on the 22d of August, 1867, they informed the defendants that they had so much invested in margins of property of that kind, that it was inconvenient for them to pay for the last 500 tierces, then on their way to the defendants, costing about \$18,000, without realizing all that they could, consistently, out of it.

The letter of Comstock & Co. of the 19th of August, 1867, was untrue. The difficulty was not with the railroad company, nor with the sellers, but with Comstock & Co. themselves. The evidence discloses this state of facts. Comstock & Co., who were residents at Indianapolis, telegraphed Culton & Sprague, commission merchants in Chicago, to purchase in Chicago, on account of Comstock & Co., the lard in controversy, to ship it to New York, consigned to Colgate & Co., the defendants, and to draw on Comstock & Co., at Indianapolis, for the amount, at sight, with the bill of lading of the lard attached to the draft. Culton & Sprague did as requested, and on the 17th of August, 1867, shipped by the railroad 200 tierces, consigned to the defendants, and took from the railroad company the original bill

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of lading and duplicate, which acknowledged that the 200 tierces had been received from Culton & Sprague, to be transported, as consigned, to the defendants, and on the 19th of August, 1867, Culton & Sprague drew a draft for the amount of the purchase and their commissions upon Comstock & Co., at sight, and attached to it the bill of lading for the 200 tierces, retaining the duplicate, which draft, with the original bill of lading, they sent through a bank at Chicago to the Indiana Banking Company, at Indianapolis, for collection, with instructions that if it was not paid, to return the draft and bill of lading to them. Culton & Sprague had no personal acquaintance with the house of Comstock & Co., and relied for the security for their advances upon the lard shipped. The draft was dated on the 19th of August, 1867. It was received by the Indiana Banking Company on the 21st of August following, and was presented upon that day to Comstock & Co., but was not paid upon presentation, as that firm claimed three days' grace, which was allowed by the Indiana Banking Company, and Comstock & Co. accepted the draft. In the meanwhile, Culton & Sprague, having received information from sources which they considered reliable in Indianapolis, which led them to doubt the pecuniary ability, stability and standing of Comstock & Co., and fearing that they were in great danger of losing the advances they had made upon the lard, went to the railroad company on the day prior to the last day of grace and stopped the lard in transitu; that is, they requested the railroad company to stop and hold it, until the draft was paid. Up to this point, there can be no question that the general ownership was in Culton & Sprague, as they retained both the bill of lading and duplicate, awaiting the payment of the draft, and the lard, though shipped and consigned to the defendants in New York, was then held by the railroad company, subject to the order of the shippers. The direction given by Comstock & Co., that the bill of lading was to be attached to the draft to be drawn upon them at sight, shows that it was alike their understanding, as well as that of Culton & Sprague, that the title to the shipment was not to pass, unless the draft was paid (*Brant v. Bowley*, 2 B. & Ad. 932; *Ogle*

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v. Atkinson, 5 Taunt. 759; *Fleeman v. McKean*, 25 Barb. 483; *Furniss v. Hone*, 8 Wend. 247).

The draft and bill of lading remained in the possession of the Indiana Banking Company until the last day of grace, the 24th of August, 1867, when H. W. Comstock, one of the firm of Comstock & Co., was allowed by the president of the Banking Company to take the bill of lading to obtain from the plaintiffs, the Indiana National Bank, by means of it, the money wherewith to pay the draft, which he did, and returned with a certified check on that bank for \$5,985, and paid the draft, which was for \$7,700⁴⁷/₁₀₀, the Banking Company giving him credit for the amount of the certified check on the plaintiffs' bank, the residue being made up of money which Comstock & Co. had on deposit in the Banking Company; and Culton & Sprague, having advices the next day, that the draft was paid, they directed the railroad company to forward the 200 tierces, which were received by the defendants on the 28th of August, 1867, and they were sold by them upon the day they were received.

It appears that the plaintiff, the Indiana National Bank, let Comstock & Co. have the \$5,985 upon a draft drawn by H. W. Comstock on the drafts for \$6,000, indorsed by Comstock & Co., secured by an indorsement of the bill of lading and the delivery of it to the plaintiff as security. This draft, dated the 24th of August, 1867, with the bill of lading attached, was presented to the defendants for payment on the 29th of August, 1867, which was refused, and on the following day they were requested to pay the draft or deliver the goods, and replied that they had sold them and could not therefore deliver them.

No title to these 200 tierces, as I have said, was or could be acquired by Comstock & Co. until the draft of Culton & Sprague was paid. Up to that time neither they nor the consignees, the defendants, could acquire any property in the lard, and whatever interest Comstock & Co. had or could acquire was by them immediately transferred to the bank, to enable them to do the very act, the payment of the draft, by which alone they could obtain any right to the lard. When the goods are shipped or afloat, the bill of lading represents them, and the indorsement

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and delivery of it has exactly the same effect as the delivery of the goods themselves, where the intention is to transfer thereby the title to the goods or to pledge them by way of security for advances or otherwise (*Newson v. Thornton*, 6 East, 41; *Short v. Simpson*, Eng. Law Rep. 1 C. P. 248; *Meyerstein v. Barber*, Id. 2 C. P. 45). Such was the case here. Comstock & Co. procured an advance from the plaintiffs upon the security of the bill of lading, to enable them to pay for the lard, and but for which payment it would never have been forwarded at all. The indorsement and delivery of the bill of lading operated as a valid pledge of the lard to the bank, and entitled the bank to demand it of the consignees, the defendants, and the defendants having sold it immediately upon the day of its arrival, the plaintiffs could maintain an action for the proceeds of the sale, as money received to its use. In *Meyerstein v. Barber* (*supra*), a lot of cotton was shipped from Madras to a London house, the consignor in Madras drawing bills against the shipment upon the London house, which the consignor had discounted at a bank, to whom he delivered the bill of lading, the cotton being deliverable in London to the shipper or his assignee on payment of freight. The cotton arrived, was landed and warehoused, and one Abraham, who had succeeded to the business of the London house, applied to the plaintiff, Meyerstein, for an advance of £2,500, to enable him to discharge the lien of the bank and to obtain the bill of lading. The bank entrusted Abraham with the bill of lading to enable him to get the means of satisfying their claim, and the plaintiff made the advance upon the bill of lading, which was in three parts, upon the delivery of two copies, supposing that the other was in the possession of the master and that the vessel had not arrived. The claim of the bank having been satisfied, and an indorsement of the bill of lading having been obtained from the shipper, Abraham, who fraudulently retained the third copy in his possession, took it and the invoice of the cotton to the defendant and obtained an advance of £2,000. The plaintiff hearing that the cotton had arrived, and that the defendant had it for sale as a broker, went to the defendant, informed him of the advance which he had made and showed the two copies of

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the bill of lading; after which interview, but pursuant to previous instruction, the defendant's clerk went to the public warehouse, had the cotton transferred to the defendant, obtained a warrant for the delivery of it, and the defendant sold it. It was held that the plaintiff might either maintain an action against the defendant for the conversion of the property, or for the proceeds of the sale, as money received to his use, and I refer to this case the more particularly because several of the propositions passed upon in it may be referred to as an answer to objections raised by the defendants to the plaintiff's right of recovery in the present case.

They were as follows: 1. That the deposit of the bill of lading with the bank in India, upon discounting the bills of exchange, operated as a pledge of the cotton to the bank, so that the bank or its representative in London had a perfect right to indemnify themselves out of the proceeds of the cotton, upon its arrival, for the advances made. 2. That the three copies constituted but one bill of lading. 3. That the property in the cotton was in the shipper, at Madras, subject to the claim of the bank. 4. That before its arrival, the property in it vested in Abraham, who had succeeded to the business of the London house, by whom the contract was made for the purchase and shipment of it. 5. That he was entitled, claiming to be the owner, to make the usual entry at the custom house, but could not obtain it from the public warehouse upon his delivery order, without producing the bill of lading. 6. That the bill of lading was the symbol of the property in the cotton, and when Abraham delivered that to Meyerstein, the plaintiff, the property passed to the plaintiff just as if the cotton had been actually delivered to him. 7. That the delivery by him of two of the three parts of the bill of lading sufficed to vest the property, and was not affected by the delivery afterwards of the cotton to the defendant upon the third part or copy of the bill of lading. 8. That the plaintiff's right of action was founded simply upon the delivery of the two parts of the bill of lading to him by Abraham, and the advance of the £2,500 he made thereon. 9. That it was a valid pledge to him of the cotton, and that he might recover either for a conversion or re-

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cover the proceeds of the sale under the count for money received.

Though it does not appear in the evidence, it is probably the fact that Culton & Sprague, when they directed the railroad company to forward the 200 tierces upon learning that the draft was paid, sent the duplicate of the bill of lading, which they had retained, to the defendants, to entitle them to receive the shipment upon its arrival in New York, a feature analogous to that of the defendant in the case cited, who, having one of the copies of the bill of lading, obtained thereby a delivery of the cotton to him from the public warehouse, and which was held not to affect in any way the right to the cotton which the plaintiff had acquired by the advance of the £2,500, and the delivery, before that, of the other two copies to him.

The decision of the Court of Appeals of our own State in *The Bank of Rochester v. Jones* (4 N. Y. 497), is equally decisive. There the bank advanced the money to the purchaser of the flour to enable him to buy it; and having refused to make the advance without security, the purchaser agreed to procure the forwarder's receipt for the flour to be purchased with the money received from the bank, and to leave it with the bank as a security for the acceptance of the draft, to be drawn upon the defendant, who was the consignee, which the purchaser accordingly did. The bank forwarded the draft, with the receipt annexed, to the collecting agent. The defendant refused to accept the draft, but took off the forwarder's receipt, got the flour and sold it. The defendant was the purchaser's factor in Albany for the sale of flour for him, and the purchaser was then in debt to the defendant for advances made, so that the case was even stronger in favor of the defendant than the one now before us, for this indebtedness existed at the time of the consignment. The action was *trover*, and it was held, reversing the decision of the Supreme Court, that the plaintiff could maintain it.

It was held, 1. That the purchaser was the general owner. 2. That there was no obligation on his part to send all his flour to the defendant, to reimburse him for the advances made. 3. That, being the absolute owner, the purchaser had full power

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and authority to sell, pledge, or dispose of the flour to the bank before it came into the defendant's possession. 4. That the transfer to the bank was good as against his agents, factors, or creditors, and all persons except *bona fide* purchasers for a valuable consideration, without notice, &c. 5. That the transaction with the bank and the delivery to it of the forwarder's receipt, gave the bank a general or a special property in the flour, which was equivalent to a pledge or a mortgage of it. 6. That the delivery of the forwarder's receipt to the bank was a symbolical delivery of the flour, either in trust, by way of mortgage, or as a pledge; and all that was here decided is applicable to the present case.

The plaintiffs acquired the title to the 200 tierces, without any knowledge of any claim to them by the defendant, the consignee or any other person, and had no reason to suppose that there could be any claim to affect the title they acquired by the delivery to them of the bill of lading, as they advanced the money to Comstock & Co., to enable the latter to obtain title, and made the advance upon what represented the property, and was the symbol and indicia of title, the bill of lading, which they took as their security.

My conclusions are, that the defendants did not make any advance upon this specific shipment. That they had no property in it except such as they might acquire as consignees, subject to the right, title and interest which the bank had acquired by the advance made and the delivery of the bill of lading to it, before the property came into the possession of the defendants. That, having sold the lard, they must account to the plaintiffs for the proceeds; and as the proceeds or value of the lard was much more than the amount of the draft, that the plaintiffs were entitled to recover the amount of the draft and damages upon the protest. The report of the referee should, therefore, be affirmed.

Judgment affirmed.

Drucker v. Simon.

SIGISMUND DRUCKER v. MARCUS SIMON.

A tenant who has been evicted from a part of the demised premises, does not, by the mere fact of his demanding of his landlord a sum by way of rent for the premises from which he has been evicted, waive his right of action for damages for the eviction.

A witness testifying as an expert in regard to the rental of houses, swore that he had had charge of the letting of 60 or 70 houses; *Held*, error to refuse to allow him to be asked on cross-examination how many houses he had let during the time he had been in that business.

In the trial of an action for damages for an eviction, it is error to allow evidence as to the difference between the rent of the demised premises and those to which the plaintiff removed, without it first appearing in evidence what was the situation, convenience, and equality of accommodation of the premises removed to as compared with the demised premises, and in case the eviction was not forcible nor sudden, that the plaintiff had made diligent efforts to get suitable premises of as good class, at the same rent, and failed.

Quare, whether such difference in rent can be recovered in any case.

It seems that the measure of damages for an eviction is the difference between the value of the premises for the residue of the term after the eviction, and the rent reserved for the same period.

The expense of removal, under certain circumstances, may also be recovered.

APPEAL by defendant from a judgment of the 7th District Court.

The action was brought to recover damages for eviction from hired premises. It appeared on the trial that the defendant had leased to the plaintiff the house No. 404 East 50th street, with the exception of the parlors and the front room on the 3d floor, for one year, beginning May 1st, 1870, and that about May 1st, 1870, the defendant put the plaintiff in possession of a portion of the demised premises, and with the plaintiff's consent, had retained possession of certain rooms. Afterwards, the plaintiff demanded possession of these rooms, and, as defendant did not give him possession, he sent him a bill for rent of such rooms, which was not paid. The plaintiff afterwards removed from the premises on account of the defendant's fail-

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ure to give him possession of the whole of the demised premises, and brought this action to recover damages for an eviction.

He recovered judgment in the 7th District Court, for \$250 and costs, and the defendant appealed to this court.

The facts relating to the admission and exclusion of evidence, are stated in the opinion.

Adolf Levinger, for appellant.

Bannigan, for respondent.

BY THE COURT.*—JOSEPH F. DALY, J.—The refusal of the landlord to give the plaintiff possession, after demand, of the part of the demised premises withheld originally by consent, justified the plaintiff in removing, and relieved him from the payment of rent after the removal. The relations of the parties and the rights of the tenant, were not altered by his demanding rent from his landlord for the portion of the house withheld. The tenant had no right to rent or any compensation for use and occupation from his own landlord because the latter withheld any part of the premises. The landlord did not agree to pay any rent, so no complication of their relations ensued, and the tenant's right to remove was unquestionable. The action was, therefore, well brought for damages for the eviction.

But the Justice erred in his rulings on the admission and exclusion of testimony as to the damage sustained. One measure of damages was the difference between the value of the premises for the balance of the term after the removal, and the rent reserved for the same period. The plaintiff was his own and only witness as to value. His testimony was offered as that of a real estate agent and expert familiar with values. It was error to disallow the defendant's question as to the number of houses the plaintiff had let. He said he had had charge of the letting of 60 or 70 houses. The defendant was entitled to learn where they were, what they were, and what rent they

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were let for, in order to ascertain the correctness of plaintiff's estimate of the rental value of No. 404 East 50th street. It would have been error to exclude it on a trial before a jury, and it was as much error to do so before the Justice.

It is doubtful whether the plaintiff was entitled to the difference in rent he paid for the demised premises, and those he removed to, or that any evidence on that head should have been allowed. If it were proper at all, the question put to plaintiff, which the justice allowed against defendant's objection, viz.: "What rent he paid for the place he moved to after he left the demised premises?" was clearly improper, without evidence as to the situation, convenience, and equality of accommodation of the premises removed to, as compared with those he left, and without evidence (as the eviction was not forcible nor sudden) that he made diligent effort to get suitable premises of as good class, at the same rent, and failed. It is doubtful, in any event, if he could recover both the difference in value of the premises he removed from, and the difference in rent of those he removed to. My view is, that the former is the compensation intended by law to protect him against the extra expense incurred by the latter. In every aspect of the case, the evidence so offered was improper. The cases to which we are referred (*Chatterton v. Fox*, 5 Duer, 64) are not positive.

The expense of removal was a proper item of damage under certain circumstances.

The judgment should be reversed.

Judgment reversed.

Schaettler v. Gardiner.

FERDINAND SCHAETTLER v. THOMAS GARDINER.

Under the provisions of the Mechanics' Lien Law for the city of New York (Laws of 1868, ch. 500, § 11), which provide that the lien shall cease after one year, if it be not continued by order of the court, the fact that an action for the foreclosure of the lien has been commenced within the year does not preserve the lien beyond the year.

But as between the lienor and parties personally liable to him who have appeared in the proceedings, and joined issue on the merits, a judgment on the merits may be rendered after the lien has expired.

Where the sub-contractor files a lien against the contractor and owner, and the contractor deposits in court, under § 10 of the act, the amount claimed with costs, the proceedings as against the owner, if he is not sought to be made personally liable, should be dismissed.

The rule of the Supreme Court requiring exceptions to the referee's report to be heard in the first instance at the special term, does not apply to a reference of the issues in proceedings for foreclosure of mechanics' liens.

APPEAL from an order of this court made at special term, denying plaintiff's motion to vacate or modify a judgment on the merits entered in favor of defendant.

This was a proceeding under the Mechanics' Lien Law of 1868, relating to the city of New York. The lien was filed May 6, 1868, by the plaintiff, a sub-contractor, against the defendant, the contractor, and Wm. H. Vanderbilt, the owner, for work and materials furnished in the erection of No. 459 Fifth avenue. The claim was for \$4,068 67, and interest from April 20, 1868. The lien notice was filed in time.

The proceeding was commenced by the lienor serving the notice to foreclose, required by § 5 of the act, upon the contractor and the owner, on May 29, 1868. The notice was returnable June 15, 1868.

On the return day, the lienor, the contractor, and the owner all appeared by attorney in this court, in response to the notice, and an order was made according to the practice of this court, requiring the issues between the parties to be joined by

the plaintiff (lienor) serving his complaint and bill of particulars within twenty days, on the attorneys of the defendants (contractor and owner), and by the defendants serving their answers thereto in twenty days thereafter.

The plaintiff served his complaint, alleging that Vanderbilt was the owner of the premises, and had made a contract with Gardiner for the carpenter-work and materials in the building; that, by agreement between Gardiner and the plaintiff, the latter performed work and labor and services, and furnished materials, in conformity with the said contract, in the erection of the building, for said Gardiner, for which Gardiner remained indebted to plaintiff in the sum of \$4,008 67; and that there was then due from the owner to the contractor more than sufficient to pay said sum. The complaint demanded judgment: I. Directing a sale of the owner's interest, &c.; and, II. Personal judgment against Gardiner, the contractor.

The defendant, Gardiner, answered denying, among other things, that he was indebted in any sum to the plaintiff; averred payment in full; and alleged that he had deposited with the county clerk, under § 10 of the Lien Act of 1863, the full amount of the lien and costs, and had it removed. The owner did not answer, and on November 27, 1868, the proceeding was dismissed as to him, on account of the deposit made as aforesaid.

On November 27, 1868, the issues between the plaintiff and Gardiner, the then sole defendant, were referred by consent to P. T. Ruggles, Esq., to hear and determine the same.

The lien expired May 6, 1869 (being one year after its filing), and was not renewed as provided by the section of the Act. The proceeding, nevertheless, was continued, and on May 30, 1870, the referee reported in favor of defendant, finding that the plaintiff had been paid in full by the defendant Gardiner, and that the defendant was entitled to judgment dismissing the complaint, with costs.

The plaintiff excepted to the referee's findings; the report was confirmed by the court June 28, 1870, and judgment for costs entered in favor of defendant.

On October 1, 1870, plaintiff moved to vacate the judgment

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or to modify the same so as to make it simply a judgment dismissing the lien with costs, and not a judgment against him on the merits of his claim on which the lien was filed. His grounds were: 1. That all proceedings were void after the lien ceased on May 6, 1869. 2. That all proceedings were irregular after the unauthorized dismissal of the proceedings as to the owner Vanderbilt, on November 27, 1868. 3. That the judgment was irregularly entered before argument of the exceptions to the referee's report.

The motion was denied, whereupon this appeal was taken.

Theo. F. Sanxay, for appellant.

Alfred Roe, for respondent.

BY THE COURT.*—JOSEPH F. DALY, J.—The effect of the ceasing of the lien for want of an order renewing it under § 11, of the Mechanics' Lien Law, chapter 500, Laws of 1863, is to destroy all recourse of the lienor to the particular property described in the lien. This has been settled in this court. The proceeding, so far as the owner of the property is concerned (if he is not personally liable to the lienor for the debt), is at an end, and the proceeding should be dismissed as to him.

But as between the lienor and the contractor personally liable to him, the ceasing of the lien does not affect the proceeding if the issue joined, and the judgment claimed by the lienor, depend, not upon the lien, but the merits of the claim upon which it was founded, if the court have jurisdiction of the proceeding.

The plaintiff cited the defendant to appear in this court by personal service of the notice required by the lien law. Pursuant to such notice, the defendant appeared. Pleadings were served joining issue upon the merits of the claim. That issue was indispensable in the proceeding to enforce the lien against the building, even if it were not made indispensable by the

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plaintiff's demand for personal judgment against the contractor. By the service of such notice, by the appearance of the parties in court, submitting to its order, and pleading, all which took place before the lien ceased, by the expiration of the year, and all which proceedings were had under express authority of the lien law, the court acquired full jurisdiction of the controversy between the parties. Jurisdiction having been acquired, the judgment rendered was regular. This view has been held in the Court of Appeals (*Maltby v. Green*, 3 Abb. Ct. App. Dec. ; 1 Keyes, 546), in a proceeding under the Erie County Mechanics' Lien Act (chap. 305, laws of 1844). And a decision arriving at the same result has been made in this court at special term (*Barton v. Herman*, 8 Abb. Pr. N. S. 399). This view is perfectly consonant with justice. It would not be fair to permit the plaintiff to avoid the effect of a judgment against him upon the merits, after a full and protracted trial of issues raised by him, necessary to his demand, in a proceeding of his own commencing, and in a tribunal of his own choosing.

As to the second point—it would seem to be proper to dismiss the proceedings as to the owner, after the lien had been removed by the deposit of the amount with the county clerk by the contractor, under the Act. The owner had no possible interest after that in the proceeding, and the lienor had no rights against the owner but was left to the fund in the clerk's hands for the satisfaction of his lien.

Upon the third point—my view is, that rule 32 (now rule 39), does not apply to a reference “of the issues” in a lien proceeding, and that the exceptions are not to be heard first at special term.

The order of special term appealed from should be affirmed.

Order affirmed.

Doughty v. O'Donnell.

MATTHEW DOUGHTY v. JAMES M. O'DONNELL.

JOHN T. STEWART v. SAME.

In an action for a breach of contract, it is a general rule that the contract furnishes the standard of relief, but compensation will only be given for actual loss sustained.

But when the party for whom the service is to be rendered wilfully delays and embarrasses the performance of the contract by the other party, who endeavors to complete it, and who is finally compelled to abandon the work, the rule that the special contract must control the rate of compensation, no longer prevails, and the party is entitled to the actual value of his services, even though it is in excess of the measure of damages fixed by the contract.

Such damages may be recovered in an action on the contract, and the plaintiff in such an action, after showing that he was prevented from performing by the acts of the defendant, may show the actual value of the services rendered, and recover therefor.

APPEAL from judgment rendered in the 7th District Court for the city of New York, in favor of the plaintiffs.

These cases were argued together, and the questions raised on the appeal are substantially the same.

In June, 1869, the defendant employed Stewart and Doughty (the last named being an auctioneer) to foreclose a certain chattel mortgage which he (defendant) held upon a liquor store and fixtures in this city. It appeared from the testimony, which was undisputed, that the defendant agreed to pay Doughty two and a half per cent. of the proceeds of sale, and said Stewart five per cent., for their respective services. It also appeared that said Doughty and Stewart entered upon the performance of their duties and rendered service and incurred expense therein, but were prevented by the defendant from fulfilling the agreement.

These actions were brought to recover damages for the breach of said agreement by the defendant.

Amasa A. Redfield, for appellant.

John C. Shaw, for respondent.

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BY THE COURT.*—LARREMORE, J.—The testimony shows that the services of Doughty in the premises were reasonably worth the sum of \$50, and those of Stewart the sum of \$160.

It was insisted by the counsel for the appellant that the actions being on contract, no recovery could be had upon the *quantum meruit* for services rendered, but only for damages resulting from the breach.

It is a general rule that the contract furnishes the standard of relief, but compensation will only be given for actual loss sustained.

But where the party for whom the service is to be rendered wilfully delays and embarrasses the performance of the contract by the other party, who endeavors to complete it, and is finally compelled to abandon the work, the rule that the special contract must control the rate of compensation, no longer prevails, and the party is entitled to the actual value of his services (*Merrill v. Ithaca & Owego R. R. Co.* 16 Wend. 586; *Moses v. Bierling*, 31 N. Y. 462, and cases there cited; *Clark v. Marsiglia*, 1 Den. 317).

I can see no reason why, in a case for damages for breach of contract, the performance of which the defendant has prevented, the plaintiffs may not recover for services rendered. Such recovery is in reality but compensation in damages *pro tanto*, and if, as in the cases before us, the defendant, by his neglect or default, has precluded the plaintiffs from ascertaining the actual amount of damage under the contract, he should be held to a recovery for services actually rendered, the amount of which, he does not pretend to deny, is in excess of the measure of damages fixed by the contract.

There was no error on the part of the Justice in admitting evidence of the value of such services. It is not a question of variance, but only of the mode of proof of the allegations of the the pleading (*Fells v. Vestvali*, 2 Keyes, 152).

The cases cited by appellants' counsel do not conflict with this view.

Clark v. Mayor &c. (4 N. Y. 338), holds that if a party

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elects to consider the contract rescinded, and brings his action for work and labor, he cannot recover profits.

Neary v. Bostwick (2 Hilt. 514), holds that, in an action for breach of contract, damages must be averred and proved, and not left to speculation.

The plaintiffs have declared on their contract, shown that the defendant hindered and prevented its performance, and they claim damages not for any profits, but in an amount to compensate them for services actually rendered under said contract, and for which amount the court below rendered judgment. The defendant offered no proof to show that such amount exceeded the rate of compensation fixed by the contract, and he should be held liable for a loss caused by his own act.

The rulings of the court below were in conformity with this view of the case, and the judgments appealed from should be affirmed, with costs.

Judgments affirmed, with costs.

JOSEPH AGATE v. ABRAHAM LOWENBEIN AND OTHERS.

Where the plaintiff has an ample remedy at law for a breach of covenant, and the damages can be exactly ascertained, and no irreparable injury will be inflicted, and there is nothing which will give rise to a multiplicity of suits, the court will not interfere by injunction to compel the defendant to perform his contract specifically; but will leave the plaintiff to his remedy at law.

So held, in a case where the tenants of a house, holding under a lease covenanting against the use of the premises "for any business that would increase the hazard or rates of insurance," were alleged to have broken the covenant; and the plaintiff, the lessor, sought to have them restrained from continuing to use the premises for the purposes forbidden by the covenant.

In such a case, the increased rate of insurance would form an exact measure of damages which plaintiff could recover at law; and the insurance premiums being payable yearly, there could be no necessity for bringing suits for the daily breach of the covenant; so that there could not be a multiplicity of suits, and there would be no irreparable injury inflicted.

Held, also, that the injunction should be refused, on the ground that it did not clearly appear that the purposes for which the premises were used by the defendant were a violation of the covenant, as it is only, as a general rule, where the rights of the parties are, or can be clearly ascertained, and are free from

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all reasonable doubt that the court will entertain jurisdiction in the first instance to restrain an act by injunction.

A demise was of the whole of one building and the three upper floors of the adjoining building, with the privilege of using the stairway of the latter building "for the carrying in and out of ashes, coal, &c." There was free access to and from the three floors of the latter building through the first building. *Held*, that the lessee had no right to use the stairway of the latter building except for the purpose stated in the lease, and an attempt to use it for any other purpose—*e. g.*, as the principal entrance to the floors above—would be restrained by injunction.

APPEAL from a decision of the court at equity term.

The plaintiff, by lease under seal, dated March 3, 1866, leased to Eugene Mendes "the whole of the building and premises known as No. 645 Broadway, in the city of New York, and also the three upper floors of No. 647 Broadway, in the said city, with the privilege of using the stairs of No. 647 Broadway for the purpose of carrying in or out ashes, coal, and so forth, with the appurtenances," for ten years from May 1, 1866, at the yearly rent of \$11,500, payable quarterly.

In the lease Mendes covenanted "that he would not use the premises mentioned in his covenant for any business that would increase the hazard or rates of insurance, more than may be caused by the steam engine and boiler to be put in said premises by said Mendes."

At the time of executing the lease, and entering into possession under it, Mendes carried on the business of chocolate manufacturing. Mendes assigned his lease to one Kerstein, on December 20, 1866, and Kerstein assigned it to the defendants, Lowenbein and Morrison, on December 21, 1866.

Lowenbein and Morrison sublet the three upper floors of Nos. 645 and 647 to the defendants, Little, Rennie & Co., who carry on, in the fifth floors of both said Nos. 645 and 647, the business of type founders; and sublet the fourth floor of No. 647 to the defendants, Muller, Schmidt & Co., bookbinders; and the third floor of No. 647 to the defendants, McGee, Madder & Co., book and job printers, who used the stairs of No. 647 for the passage of customers, and all customary ingress and egress to their place of business on the third floor, and put their signs on the stairs and over the entryway of No. 647.

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The three upper floors of Nos. 645 and 647 opened into and communicated with each other when Mendes took the lease, and formed, each floor of each number, with its corresponding floor in the other number, one large floor with archways connecting.

On May 1, 1870, when the premises were used and occupied by the persons and in the manner above named, the insurance companies in which plaintiff insured the buildings Nos. 645 and 647, increased their rates of insurance on said buildings, by the addition of 50 cents per \$100 on the usual rates. These increased rates were those regularly imposed by insurance companies for risks classed as "specially" hazardous. The buildings were, before May 1, 1870, rated at "extra" hazardous rates only. It was proved on the trial, that the increased rates imposed *after May 1, 1870, were on account of the bookbinding and job printing carried on there by defendants*; stereotyping, job printing and bookbinding being rated as specially hazardous by insurance companies. It was also proved that steam engines and boilers were rated either as extra hazardous or specially hazardous, according to the business in connection with which they were used, and in the discretion of insurance companies. That they were rated as specially hazardous in a majority of cases; and in a factory where chocolate was manufactured to a large extent, they would be rated as specially hazardous; if to a small extent, they would not be so rated. That one insurance company might regard it as special, another might not.

On these facts the plaintiff asked judgment: 1. Restraining the defendants from carrying on or conducting in the buildings 645 and 647 Broadway, or in any part thereof, the business of job printing or bookbinding, or any business which might increase the hazard more than was specified in the lease to Mendes; and, 2. Restraining the defendants from using or permitting to be used, the stairs of No. 647 Broadway, except for the purpose of carrying in or out ashes, coal, and so forth.

Upon the trial at equity term, before Judge JOSEPH F. DALY, judgment was given denying the first portion of the relief asked, but granting an injunction restraining McGee,

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Maddern & Co. from using the stairs or entryway of No. 647 Broadway for any purpose, except to carry in or out ashes, coal, fuel, and necessities generally, without reference to their business, and carry out wood, coal, fuel, and refuse necessary to their tenancy, without reference to their business.

From this judgment appeal was taken by the plaintiff, and also from so much thereof as was adverse to them, by McGee, Maddern & Co.

C. Bainbridge Smith, for appellant.

H. Morrison, for respondents.

BY THE COURT.*—DALY, CH. J.—There was no ground for equitable interference for the alleged breach of the covenant, that the premises were not to be used for any business that would increase the hazard or rates of insurance more than would be caused by the steam engine and boiler, for the reason that the plaintiff has an ample remedy at law. If the premises are so used, and the plaintiff has in consequence to pay an increased rate for the hazard of insurance, then the increased amount he has to pay for insurance is the exact measure of his damages for the breach of the covenant, and this he may recover in an ordinary action. Courts of equity interfere to prevent an injury that would be irreparable, or where, as the Vice-Chancellor said in *Steward v. Winters* (4 Sandf. Ch. 591), "it is manifest that the extent of the injury is difficult to be ascertained or measured in damages," or where, as in that case, a new cause of action would have arisen every day, by the continuance of the breach; for which reason a court of equity will lend its aid to prevent, or dispense with, a great number of actions. But this is not such a case. There is no difficulty in it in respect to the measure of damages. The covenant itself showing what the measure is to be, and as the premium upon fire policies is payable for the whole period upon the delivery of the policy (1 Phillips on Ins. 505), and in this city upon continuing policies annually, there was no ground for in-

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terference to prevent multiplicity of suits. "The equitable remedy," says Adams, "is not concurrent with the legal one, and will not be substituted for the legal remedy, unless a particular necessity be shown" (Adams' Doctrine of Equity, 83), and no such particular necessity exists in this case.

Moreover, it is not for equitable interference sufficiently clear, upon the covenant and the evidence, whether the letting of the premises for the carrying on of the business of job printing, stereotyping and book binding, or for the manufacturing of chocolate, was a violation of the covenant; as it appears from the evidence, that steam engines are classed as extra or specially hazardous according to the business in which they are used. It may be urged that the "hazard" that, in the language of the covenant, may be caused by the steam engine, necessarily means the use of it in the building in connection with such trade or occupations as are ordinarily carried on in such places with the aid of an engine. I do not mean to say that in an action brought to recover damages for the breach of the covenant in which this question would have to be passed upon, the legal conclusion would, or ought to be, that the letting out of parts of the premises for the carrying on of these occupations, was no breach of the covenant. The conclusion might, and very possibly would, be the other way; but courts of equity are not called upon to construe contracts where the meaning is ambiguous, doubtful, or uncertain, unless it be in a case where their aid is invoked to arrest an irreparable injury, and the party has no other remedy (*Fisk v. Wilber*, 7 Barb. 395). It is, as a general rule, only where the rights of the parties are or can be clearly ascertained, and are free from all reasonable doubt, that the court will entertain jurisdiction in the first instance to restrain an act by injunction (*Snowden v. Noah*, Hopk. 353; *Olmsted v. Loomis*, 6 Barb. 164; *Bonaparte v. Camden, &c. R. R. Co.* 1 Bald. C. C. R. 218; *Brown v. Newall*, 2 Mylne & C. 570; 1 Story's Eq. Jurisp. § 959, b).

This disposes of the appeal on the part of the plaintiff. It now remains to consider the appeal from the injunction granted to restrain the defendants, McGee, Maddern & Co. from affixing their signs upon the stairway of the building No. 647; for if

they were not entitled to do this under the lease given by the plaintiff, the keeping of the signs there is a continuous trespass, which, as already suggested, will authorize equitable interference to prevent a multiplicity of suits.

The demise was of the whole of the building known as No. 645, and the three upper floors of the one known as 647 Broadway, with the privilege of using the stairs of No. 647 for the purpose of carrying in or out ashes, coal and so forth. The buildings adjoin each other, and when the lease was granted the three upper floors of No. 647 opened into and were connected with the corresponding floors of No. 645. As there was, under this arrangement, free access to and from the three upper floors of No. 647, through and by the entrance and stairway of No. 645, it is very clear that the right to use the stairway and entrance upon the front floor of 647 was not granted, except for the purpose stated, the "*carrying in and out of ashes, coal and so forth.*" If the lessee could not, when the demise was made, have access to and from the three floors of 647, and the complete enjoyment, except by the use of the stairway and entrance on the first floor of the building, then a right of way by the stairway and entrance would of necessity, pass as incident to the grant (*Lifford's Case*, 11 Co. 52; *Holmes v. Seely*, 19 Wend. 507; *Doty v. Gorham*, 5 Pick. 487). But free access to these floors through the entrance and stairway of 645 was provided from the way in which the buildings were arranged, and the qualified right granted in respect to the stairway and entrance of 647 shows very plainly what was intended: that he was to have the right to use the latter for a particular purpose, and where an easement of this description is granted for a particular purpose, it does not include a right of way for another purpose (*Cowling v. Higginson*, 4 Mees. & Welsb. 245). Thus it was held in *Jackson v. Stacey* (Holt's N. P. C. 455), that a right of way for agricultural purposes, that is, to carry corn and manure over the *locus in quo*, did not give the right to carry lime, or the produce of a quarry over it at all times and for all purposes, and in *Ballard v. Dyson* (1 Taunt. 279), that a right of way for carriages does not include a way for cattle. A right of way for some purposes, said the court

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in *Brunton v. Hall* (1 Gale & D. 207), must not be enlarged for other purposes. The defendants, McGee, Maddern & Co. by putting up a sign over the entrance, and signs along the stairway, undertook to make that the chief and principal entrance to the floors above, which was clearly not what was contemplated or intended by the lease. It was to be used to carry ashes and coal and so forth in and out. There is nothing in the words "and so forth" that would embrace the privilege claimed. "And so forth" means "of the like kind" (Worcester's Dictionary). It is equivalent to and has the same meaning as "et cetera" (Cole's Dictionary, 1717; Todd's Johnson Dictionary), in the first of which dictionaries, "*et cetera*" is defined "and so forth," and in the latter, "a common expression denoting others of the like kind."

The decision of the judge at the special term should therefore be affirmed.

Judgment affirmed.

CHARLES B. BOSTWICK v. WILLIAM MENCK AND ANDREW BEISER.

The province of a supplemental complaint is to present such facts material to the case, occurring after the making of the former complaint, as aid the original statement of a cause of action or tend to vary the relief to which the plaintiff is thereby entitled, or which tend to perfect an inchoate right so stated, which has since been made or become complete.

Such supplemental matter, however, can, with the original complaint, constitute but one cause of action, and if the cause of action sought to be enforced by the original complaint did not exist or was defective at the time of the commencement of the action, it cannot be created, cured or aided by matters subsequently occurring. The matters subsequently occurring and sought to be introduced by supplemental complaint must be such as do not change the rights or interests of the parties before the court, but must merely refer to and support the same title alleged in the complaint, and already presented to the court. A new substantive cause of action cannot be supplied or introduced into the case by supplemental bill.

Where a receiver, appointed in supplementary proceedings, brings an action to set

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aside a conveyance fraudulently made by the judgment debtor, and subsequent to the commencement of the action, other judgments are recovered against the same party, and he is appointed receiver in supplementary proceedings taken on behalf of other judgment creditors, he cannot, by a supplemental complaint, include these claims in the original action.

APPEAL from an order granting the plaintiff leave to file a supplemental complaint.

This action was instituted March 16th, 1857, by the plaintiff, as receiver, in proceedings supplementary to execution issued against the defendant Beiser, upon a judgment for \$201 60, recovered against him by one Dolan, for the purpose of setting aside a general assignment made by Beiser to the defendant Menck, for the benefit of his creditors, as fraudulent as against Dolan. The complaint, which was served September 10th, 1857, also alleged the appointment of the plaintiff as receiver, in supplementary proceedings on two other judgments, but otherwise made no allegation that the suit was brought in any other right or on behalf of any other creditor of Beiser.

The action was tried in December, 1858, and judgment rendered that the assignment was fraudulent and void; for an accounting of all the property and effects which had passed under it, and for the delivery and payment of the whole thereof to the plaintiff.* This judgment was affirmed by the general term of this court, but, on appeal to the Court of Appeals, it was, in June, 1869, reversed,† and a new trial ordered; unless the plaintiff stipulated, within thirty days from the entry of and notice of the order, to take judgment for the amount of the Dolan judgment and costs.

The plaintiff refused to give such a stipulation, and claimed that the reversal occurred from his failure to show that he had also been appointed on behalf of other creditors of Beiser, or that his receivership had been extended for their benefit. Subsequently, in July, 1869, the plaintiff applied for leave to file a supplemental complaint alleging the recovery of six other judgments against Beiser, and the appointment of the plaintiff since

* See a decision concerning the form of decree in this case, made at special term, in February, 1859, reported in 10 Abb. Pr. 197, *sub nom.* *Bostwick v. Beiser*.

† The opinion rendered on the reversal is reported in 40 N. Y. 383.

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the commencement of this action as receiver, upon supplementary proceedings therein. By an order dated September 8th, 1869, leave to file such supplemental complaint was granted him,* and his appeal was taken from that order.

Andrew Boardman, for appellants.

C. Bainbridge Smith, for respondent.

BY THE COURT.†—ROBINSON, J.—[After stating the facts.] The province of a supplemental complaint is to present such facts, *material to the case*, occurring after the former complaint (Code, § 177), as give aid to, or tend to vary the relief to which the plaintiff was entitled by, his original statement of a cause of action, or to perfect an inchoate right so stated, which has since been made or become complete.

Imperfections in the complaint, in allegations affecting the rights sought to be enforced, are to be remedied by amendment, although the Code (§ 177) allows the correction by supplemental pleading, where “the party *was ignorant*” of them “when his former pleading was made.” But such supplemental matter introduced into the record still constitutes but *one* cause of action (Story Eq. Pl. § 332), and if the cause of action sought to be enforced by the original complaint did not then exist, or was defective at the time of the commencement of the action, it cannot be created, cured, or aided, by matters subsequently occurring. The events or matters subsequently occurring, and sought to be introduced by supplemental complaint, must be such as do not change the rights or interests of the parties before the court, but must merely refer to and support the same title alleged in the complaint, and already presented to the court (Story Eq. Pl. § 336; Daniel’s Ch. Pr. 154).

A new substantive cause of action cannot be supplied or introduced into the case by supplemental bill (*Watson v. Thibou*, 17 Abb. Pr. 184; *Milner v. Milner*, 2 Edw. Ch. 114; *McCollough v. Colby*, 4 Bosw. 603; Story Eq. Pl. §§ 336, 339; *Dickson*

* The opinion rendered by DALY, Ch. J., at special term, on giving leave to file the supplemental complaint, is reported in 8 Abb. Pr. N. S. 169.

† Present, ROBINSON, LOW, and LARREMORE, JJ.

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v. *Pointdexter*, 1 Freeman Ch. 721). Previous to the Code different persons (including judgment creditors, having a common, but not joint, interest in the relief sought), were permitted to join as plaintiffs (*Brinkerhoff v. Brown*, 6 John. Ch. 139; *Murray v. Hay*, 1 Barb. Ch. 62); and the Code (§ 117) contains a provision to the like effect, that "all persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title." A receiver in proceedings supplementary to execution, represents the creditor on whose behalf he is so appointed, and becomes entitled to enforce the rights of such creditor, to such extent as is necessary to procure satisfaction of the debt. But where, at the time of the commencement of his suit to enforce such rights, he is receiver in other supplementary proceedings instituted by other judgment creditors, and he seeks also to enforce their rights, he must properly state a cause of action on their behalf; and the question on this appeal is, whether the rights of any such other judgment creditors, whose rights to assail such fraudulent assignment, have been perfected by return of execution, supplementary proceedings, and the appointment of a receiver before or subsequent to the commencement of this action, but whose rights had not been suggested in the original complaint, can be presented by way of supplemental complaint? Upon the principles governing such a proceeding (as above stated) it seems clear that such rights of the judgment creditors, whose claims were in no way presented by the original complaint, and whose judgments were recovered, and the appointment of the plaintiff as receiver in their behalf procured, subsequently to the commencement of this action, cannot be so presented by supplemental complaint.

As judgment creditors with executions returned unsatisfied, or through a receiver appointed in their behalf, they might have commenced separate actions, or, under the provisions of the Code (§ 117), have united in an action by themselves, or the receiver appointed in their behalf, for the purpose of obtaining the like relief of setting aside the assignment made by their debtor in fraud of their rights, and for the proper statement of their several causes of action, it should appear that they were

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judgment creditors with executions therein returned unsatisfied, and for cause of complaint, that an assignment had been made by their debtor, in fraud of their rights, of property which should be applied to the payment or satisfaction of their debts, but the presentation of the claims of another plaintiff suing in his own behalf (or as representative of any such separate right), with a view to procure the same relief as was the object of an existing suit between other parties, is the statement of a new and distinct cause of action. The supplemental complaint sought to be filed in this action states no matter which aids or varies *the case* presented by the original complaint, nor in any way *supports the rights* of the judgment creditors mentioned therein, but alleges and presents claims on behalf of other creditors which are entirely independent, and are wholly unaffected by the pleadings interposed, or other proceedings which have taken place in the original action. The fraudulent assignor could not impeach his own assignment, nor could any other person do so, except as a creditor, by judgment, after execution thereon had been returned unsatisfied, who should, by his own suit, or through a receiver appointed in his behalf, evince his dissent thereto by assailing it in a direct proceeding instituted for the purpose of avoiding it. Such a suit being an original action instituted exclusively for the benefit of the particular creditor, in whose behalf it is brought, cannot be engrafted or interpolated by supplementary complaint into another *original* action instituted for a like purpose by or in behalf of other creditors. The original suit having progressed for the exclusive benefit of the parties to it, or whose interests are involved therein, the claims of other creditors constitute grounds for relief by original complaint in their own behalf, which are to be determined according to the case made by each claimant. But if, by neglect, any such creditor has failed to properly present his rights within the period prescribed by the statute of limitations for equitable demands, the parties in adverse possession are entitled to the benefit of the "statute of peace," so far as it operates in their favor, and to claim its exemption from responsibility as an original defense to any action brought in derogation of the rights which they shall have enjoyed under

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it. As to matters of mere supplemental relief, no such defense would avail, and it may well be conceived that the introduction of these new claims into the case, distinct from those made by the original complaint, would interfere with existing rights, and introduce complications which would interrupt the ordinary course of pleadings and proceedings as settled and defined by our system of practice. The necessity for the institution of a separate suit or suits in behalf of the new claimants (whether they may hereafter be united or consolidated with the present suit or not), seems to be clearly maintained by the authorities above cited, and also by the opinion of Justice Grover in this case, when in the Court of Appeals (40 N. Y. 386, concurred in by a majority of the court, p. 390). He holds that the right of the receiver in the property alleged to have been fraudulently assigned, is *no greater* than that of the creditor he represents, and that the right of the creditor to treat as void, and to set aside, the transfer of the property fraudulently assigned, exists only "so far as shall be necessary to satisfy his debt and costs." "He has no right to interfere with the transfer beyond this. When his debt and costs are paid, the transfer is as valid as to him as to other persons ;" and he further distinctly holds as follows: "But the same person may be appointed receiver, after he shall have commenced an action by virtue of a previous appointment ; *in such a case, he must commence a new suit* to enforce the rights so acquired. There is no greater incongruity in this than in the commencement of separate suits, by several creditors, against a fraudulent assignee, to enforce their respective rights." This is an express and authoritative recognition of the principles above stated, and is fatal to the right to present in this action, by way of supplemental complaint, claims of other judgment creditors than those whose rights were sought to be enforced in the original complaint.

The order appealed from allowing the statement by way of supplemental complaint of these further causes of action, on behalf of other claimants having distinct interests from those represented by the original complaint, cannot be sustained, and should be reversed, with costs.

Order reversed.

Heinrich v. Korn.

CHARLES HEINRICH AND ANOTHER v. CHARLES KORN.

A real estate broker, being employed to find a purchaser for a house and lot, introduced to his principal a person who verbally agreed to buy the property at a certain price, at the same time paying ten dollars on account of the purchase money, for which the vendor gave a receipt, stating that the "sum received was part of purchase money on the sale of my house." *Held*, that the broker had performed his agreement to find a purchaser, and was entitled to his commission, although subsequently the purchaser refused to take the property.

The broker is entitled to his commission as soon as he has found a party willing to purchase on terms which the vendor is willing to accept, and without regard to the question whether he subsequently refused to complete the bargain. It is not necessary to entitle the broker to compensation that the contract to purchase should be in writing.

APPEAL by the defendant from a judgment entered on the report of a referee.

The facts are stated in the opinion.

Samuel Hirsch, for appellant.

Edward T. Bartlett, for respondents.

BY THE COURT.*—LARREMORE, J.—In January, 1869, the plaintiffs were real estate brokers, doing business as such, and were authorized by the defendant, who was the owner of premises No. 182 Ludlow street, to find a purchaser therefor, and for which they were to be paid the usual commission of one per cent.

Plaintiffs subsequently introduced one Adam Schwab to the defendant, and negotiations were had between the parties, which finally resulted in defendant's executing (conjointly with his wife), the following receipt:

"Heinrich & Co., Real Estate Brokers. Received from Mr. A. Schwab the sum of ten dollars, part of purchase money on the sale of my house, No. 182 Ludlow street, in the city of New York, for \$22,100.

"New York, January 28, 1869.

"CHARLES KORN.

"BARBARETHA KORN."

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ.

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The \$10 was paid by Schwab to defendant, for which the above mentioned receipt was given to Heinrich. It appears by the testimony that the receipt was given preliminary to an agreement to be executed by the parties, in which the terms of sale should be more fully stated, and upon the execution of which, \$500 were to be paid. This agreement was never consummated.

Schwab declined the purchase, and the defendant having refused to pay plaintiff's claim for commissions, suit was brought for its recovery.

The referee to whom the case was referred, has found as matters of fact and law that the plaintiffs were employed by the defendant to procure a purchaser for his house; that they had procured such purchaser; and were entitled to their commissions.

The defendant excepted to the third finding of fact and the legal conclusion derived therefrom, as contrary to law and the evidence in the case. As this involved the main question raised on the argument, its determination will necessarily be decisive of the merits of this appeal.

The referee has found that there was an employment, and such finding being supported by competent evidence, is conclusive as to the parties to this suit.

Did the plaintiffs then fulfil the terms of their employment—did they procure a purchaser for the premises in question?

The testimony shows, that they introduced Schwab to the defendant, and an arrangement was made between them for the sale and purchase of defendant's house. The minds of the parties met, and were expressed in the payment of money and the giving of a receipt on account of the purchase price.

Defendant was not compelled to give such receipt or accept the money named therein. He could have refused to sell until a more suitable contract had been prepared and the \$500 were paid. He chose to consider the sale as made when the receipt was given, and trusted to the credit and honesty of the purchaser for the payment of the \$500, and the execution of another agreement. In this he acted upon his own responsibility, and must suffer the consequences of his own omission or neglect.

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The plaintiffs are not accountable for the imperfect manner in which the agreement or receipt was drawn; it was not their duty to supervise its execution; nor were they responsible for its performance. They found a purchaser whom the defendant accepted, and thus performed the services for which they were employed (*Barnard v. Monnot*, 1 Abb. Ct. App. Dec. 105; 3 Keyes, 203).

No collusion is shown between the plaintiffs and the purchaser, nor can the pecuniary ability of the latter be questioned, for it is in evidence that he subsequently purchased and paid for another house the sum of \$19,000. That the purchaser changed his mind was no fault of the plaintiffs. Suppose he had signed the contract of purchase and afterward became insolvent and unable to perform—would that have defeated plaintiffs' claim for commissions? The reasoning of the Court of Appeals in *Barnard v. Monnot* (*ante*) is clearly opposed to such a theory.

It was insisted on the argument that the agreement between Schwab and the defendant was void by the statute of frauds, and that the defendant could not enforce the same. I do not consider it necessary to pass upon that question in the present determination of this case. If I have correctly understood and applied the principles laid down in *Barnard v. Monnot*, it is evident that the plaintiffs' claim for commissions is independent of the execution of any agreement between the defendant and the purchaser, and consequently such claim cannot be affected by the validity or invalidity of the agreement in question.

The judgment appealed from should be affirmed.

Judgment affirmed.

Gomez v. Kamping.

RAPHAEL M. GOMEZ AND ANOTHER v. JOHN A. KAMPING.

Where the answer in an action for conversion sets up that the title of the plaintiffs in the property is that of mortgagees only, and that defendant is entitled upon making a payment, to withdraw a proportionate part of the hypothecated property, and that he has made such a payment, for which, in making demand of the goods, the plaintiffs have made no allowance;—this is an admission of a valid transfer of an interest in the goods to plaintiffs, and of their right to recover for a proportionate part, as well as of a demand for the goods. Per ROBINSON, J.

Under such pleadings, the defendant will not be permitted to show, on the trial, that the plaintiffs had no interest in the goods whatever, nor that defendant holds them as a bailee for the plaintiffs.

The defendant gave the plaintiffs an unsigned bill of sale for goods, and at the same time signed a receipt, reciting that he had received the goods on storage for plaintiffs. *Held*, that the two instruments were to be construed together, and made a valid sale, as the latter instrument was an acknowledgement of the consummation of the contract of sale, and was evidence that the defendant retained the goods as a mere bailee for the plaintiffs.

Defendant being indebted to plaintiffs, on a note, gave them a bill of sale of certain goods for the amount due, and while retaining the possession of the goods, gave plaintiffs a storage receipt, acknowledging that he held them for plaintiffs. It was verbally agreed that defendant might have the goods again by paying the debt in a specified time, and plaintiffs retained the note. *Held*, this was a conditional sale, and not a mortgage of the goods.

EXCEPTIONS heard at general term.

On December 24th, 1867, the plaintiffs held the promissory note of the defendant, due that day, for \$615 09. The defendant, being unable to pay the note, and having 50 cases of Muscat wine and 100 cases of Hygienic wine, gave plaintiffs a bill of sale of such wines as follows:

“New York, December 24th, 1867.

Messrs. Gomez, Wallis & Co.

Bo't of J. A. Kamping, importer
of wines, 31 and 33 Broadway.

50 cases Muscat wine (50 doz.)	.	.	\$200 00
100 cases Hygienic wine (100 doz.)	.	.	415 00
			<hr/> \$615 00.”

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The goods were not delivered, but defendant gave plaintiffs the following storage receipt :

“ New York, December 24th, 1867.

“ Received on storage from Messrs. Gomez, Wallis & Co. fifty (50) dozen Muscat wine, and one hundred (100) dozen Hygienic wine, at No. 33 Broadway, in basement. J. A. Kamping.”

The plaintiffs gave defendant permission to get them back in thirty or forty days, he paying the money.

The plaintiffs always retained the original note for \$615 09.

On March 27th, 1868, the defendant paid \$50 on the note ; and on May 23d, 1868, he also paid \$50 on the note.

On November 12th, 1868, plaintiffs demanded the wines of defendant, sending a cartman therefor with the following written order : “ New York, 12th November, 1868. Messrs. J. A. Kamping, 33 Broadway. Please deliver to John G. Glasson or order fifty (50) dozen Muscat wine and one hundred (100) dozen Hygienic do., stored for our account, and oblige. Yours, &c., Gomez, Wallis & Co.” The defendant refused to deliver the wines.

The plaintiffs then brought this action for unlawful conversion, claiming damages \$615 09 and interest. The defendant answered that he delivered the bill of sale and storage receipt as security only for the indebtedness of \$615 09, with the understanding that as he paid on account he might withdraw a proportionate part of the wines so hypothecated ; that he had paid \$100 on account of his debt.

On the trial, the plaintiffs offered to return the note for \$615 09, which defendant declined to accept.

The court ordered a verdict for \$697 60 for plaintiffs. The defendant asked the court to instruct the jury to deduct the \$100 paid by him, which the court refused.

The exceptions were ordered to be heard in the first instance at the general term, and judgment suspended.

D. S. Riddle, for defendant.

John P. McGowan, for plaintiffs.

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ROBINSON, J.—Plaintiffs sued for a conversion of a quantity of wines they had entrusted to defendant's possession.

He denied such conversion, and alleged that, being indebted to plaintiffs in the sum of \$615 09, he delivered to them, "as security, and not otherwise, for the payment of said indebtedness, a bill of sale and storage receipt of the wines mentioned in the complaint, with the understanding that, as this defendant paid on account of said indebtedness, he might withdraw a proportionate part of said wines so hypothecated." That he had paid \$100 on account, and the demand of plaintiffs was for the whole of the wines, without allowing him for this credit, or deducting a proportionate part, as agreed, and that he refused to comply with plaintiffs' order for the whole, under these circumstances.

The admission of a valid transfer of the wines and the right to recover for all but a proportionate part (as \$100 is to \$615), is complete; but the claim to withdraw such proportionate part, or some indefinite articles out of those transferred, as payment was made therefor, is the only qualification to the allegation of the complaint of ownership and right to possession, as well as of a demand for the wines, so sold to and held on storage for the plaintiffs.

On the trial, it appeared that the sale was made December 24th, 1867, on the maturity of a note of defendant for the amount above stated, and that the amount of the note was the *agreed price* for the wine; *that the privilege was given him to get the goods back on paying the amount in thirty or forty days*; that he had repaid \$50 in March and \$50 in May following; that the demand for the goods on the part of the plaintiff was made of defendant in November, 1868, when he said "he could not deliver the wines," and being asked the reason why, he stated "he had disposed of it, and did not have it."

Neither the existence of the plaintiff's title in at least five-sixths of the goods, nor defendant's possession of them as a mere bailee, or his refusal to surrender them, were put in issue by the pleadings. Under these circumstances, there does not seem to be any question of the plaintiff's right of recovery. The motion to dismiss the complaint for any of the reasons

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stated, founded upon the want of defendant's signature to a bill of sale produced, or for the non-surrender of the note at the time of the sale, was properly denied.

These objections, taken on the trial, as well as the points and arguments of the appellant, disregard the case presented by the pleadings, which admitted the sale and transfer of the property to the plaintiffs, as security for an antecedent debt, and that the possession of the defendant was only that of bailee, with special rights of reclamation or withdrawal as payments were made.

The considerations which the defendant presents, in denial of the validity of the sale, ought to have been raised by the answer. On the trial he was precluded from bringing into question what was distinctly alleged and he had admitted by his pleading. The value of the goods, at the time of the demand and refusal to deliver them, was conceded to be \$1,200, and the recovery of but \$697 60 worked no injustice, unless the interest of the plaintiffs in the goods was only as mortgagees, and to the extent of any balance due them on the note, after allowing the \$100 as having been paid upon it, as *a debt*, not by way of purchase of the property. The unsigned bill of sale and the storage receipt, dated the same day, given simultaneously, but subscribed by defendant, are to be taken together and accepted as part of the same transaction. The latter constituted more than a symbolical delivery, and being in writing, not only affirmed the sale, but evidenced in express terms that the possession of the goods retained by the defendant was in the character of *bailee* (Browne on Statute of Frauds, §§ 322 to 327).

This written recognition of the sale and express acknowledgment of the execution of the *contract* of sale and of such new relation, was a compliance with and a consummation of the purposes of the statute of frauds, which is only directed against *executory* contracts for the sale and delivery of goods.

No proof was given by defendant that the papers were executed *as a mere security*, or that the transaction was intended as a mere mortgage (*Grimstone v. Carter*, 3 Paige, 421; *Robinson v. Cropsey*, 6 Id. 480; *Holmes v. Grant*, 8

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Id. 243 ; *Quirk v. Rodman*, 5 Duer, 285 ; *Saxton v. Hitchcock*, 47 Barb. 220). While absolute grants or transfers of property may be shown by parol to have been intended as mortgages, and there is often much difficulty in distinguishing a mortgage from a conditional sale, I think the present case is of the latter character. The evidence established, that the property was sold for a fixed price ; that the debt due upon the note was paid and extinguished by the sale (4 Kent's Com. 144, note *a*), and the mere retention of the paid note for the purposes of the conditional repurchase, did not continue it as a legal obligation of any force or effect. The plaintiff's testimony as well as the writings showed that the transaction was a sale with a conditional right of repurchase by payment, in thirty or forty days, of \$615 (the amount of the matured note), and the defendant failed to offer any contradiction. By express agreement, the property was held by the defendant on *storage*, and the new relation of bailor and bailee was established. This vested in the plaintiffs the complete ownership of the property, with all attendant risks of casual loss, except such as might occur through the neglect of the defendant as warehouseman.

Under these circumstances, the *express* agreement of the parties, defining their respective relations to the property, cannot be varied by parol, to show a different intent from that evidenced by the legal construction resulting from the writings made between them. The point under consideration is solved by answer to the question : Which of the parties to this transaction would have sustained the loss from an accidental destruction of the property by fire, immediately after the transaction of the 24th of December ? It is manifest it would have fallen upon plaintiff. The express agreement of the parties in writing constituting the transaction a conditional sale, and the obligation of the defendant that of a *mere bailee*, could not be varied by parol testimony, far less (in the absence of fraud, accident or mistake) can any latent intent be presumed contrary to the *express declaration of the parties* so as to construe the transaction into a mortgage.

The conditional right of repurchase was never consummated, and the partial payments to effect it did not, under the

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evidence, restore him to any rights in the property, or entitle him to any credit for the amounts he had so paid in part (but incomplete) performance.

The amount for which the verdict was directed was less than the value of plaintiff's interest in the property converted by the defendant to his own use, and was in no respect prejudicial to any of his legal rights.

Judgment should be rendered for the amount of the verdict.

LOEW, J., concurred.

JOSEPH F. DALY, J. (dissenting).—My view is that the transactions between plaintiffs and defendant on December 24, 1867, amounted to a mortgage of the wines to secure the payment of the defendant's note for \$615 09 due that day. The plaintiffs' testimony shows this. The bill of sale conveyed the title in the wine to plaintiffs, but the defeasance is sworn to by Arguimban, one of them, who says, "I gave him the privilege to get them back in 30 or 40 days, he paying me the money. The note, the original evidence of the debt, was also retained, and *payments on it* were afterwards received by plaintiffs. These circumstances constituted plaintiffs mortgagees only (31 N. Y. 542; 8 Wend. 375, 392; 8 Johns. 96; 7 Cow. 290).

The defendant was a mortgagor in possession. The storage receipts he gave amounted to no more than the usual covenant in mortgages, that until default the goods were to remain with the mortgagor.

The defendant did not pay the note in 30 or 40 days, and the plaintiffs became entitled to take the goods as mortgagors. The defendant paid \$50 about a month after default, and another \$50 about three months after default. These payments reduced the mortgaged debt, but did not extend the time nor waive the default (*Charter v. Stevens*, 3 Den. 33).

The plaintiffs had the right to take the goods when they made the demand, nearly six months after the last payment, and if they were refused, had the right to recover them or to sue as for a conversion. But even if they were delivered, the defendant would have had the right to redeem them before sale

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by tendering the balance due on the debt (Story on Bailm. § 287); and when sued for the property or the conversion, he has a right to mitigate the plaintiffs' recovery by reducing it to the amount actually due upon the mortgage (*Hinman v. Judson*, 13 Barb. 629).

This rule should have been applied on the trial of this action. The defendant asked it and the judge refused. The plaintiffs are entitled to judgment for \$615 09, with interest from December 24, 1867, less \$50, with interest from March 27, 1868, and \$50, with interest from May 23, 1868. If the plaintiffs consent to such modification, they may enter judgment therefor; if not, a new trial should be ordered.

The defendant is entitled to costs of this appeal.

Judgment for the amount of the verdict.

WILLIAM R. CLARK AND ANOTHER v. JAMEL LYNCH, SHERIFF, &C.

The plaintiffs shipped from Boston to C. at New York, certain goods to be paid for "on arrival." On the arrival of the goods in New York, but before they had been delivered to C., and while they were in the possession of the carrier, they were levied on by the sheriff under an attachment issued to him in an action against C. *Held*, that as the goods had never come into the possession of C., no title thereto had passed to him or to any one claiming in his right, and the sheriff acquired no title by the attachment.

Held, also, that as C. had, previous to this purchase or immediately after, failed in business, of which fact the plaintiffs were ignorant when they shipped the goods, they had a right, in default of payment of the price, to reclaim the goods from the carrier or from the hands of any creditor or voluntary assignee of the purchaser, merely acting in his behalf or in the exercise of such rights as he possessed.

Held, also that the plaintiffs had a right to reclaim the goods by the power of stoppage *in transitu*, since the power which a purchaser of goods has of taking possession of the goods from the hands of the carrier, and thus determining the right of stoppage *in transitu*, cannot without his direct intervention be exercised by or on behalf of a creditor by way of attachment or levy upon his interest.

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APPEAL by the defendant from a judgment entered on the verdict of a jury. The action was brought to recover damages for the conversion of personal property. The facts were as follows: The plaintiffs, merchants in Boston, upon the order of one John Curtis, a merchant in New York, on the 25th day of April, 1864, sold to him 10 tierces of salmon, the property in dispute, at \$40 per tierce, and shipped them to him by the Old Colony and Fall River Railroad Corporation, common carriers, taking a receipt therefor, expressing that the goods were to be delivered to John Curtis or his order, at the depot of the company in New York, on payment of freight.

The sale was "a cash sale" in the regular course of business between the parties and on the promise of the purchaser to pay on arrival.

After the goods arrived in the city of New York, and while they were still on the wharf of the common carriers, they were attached and taken possession of by the defendant under an attachment issued to him out of the Supreme Court of this State, at the suit of a creditor of Curtis, for an amount exceeding the value of these goods, and on taking such possession, he paid the freight from Boston. Curtis had failed in business in the time which intervened between his order and the arrival of the goods, and never attempted to exercise any control over them.

On the 2d of May, plaintiffs, apparently ignorant of the attachment, wrote him saying that they had heard he was in difficulty in his business; that they were looking for a check for the bill as promised, and added: "You know, to buy goods and let them go to your creditors would not be right, and we have confidence you will pay us." On the 20th of May, Curtis wrote them, saying, "Can't you fix some way to say, you sent me those tierces of salmon to sell on commission? Then I could turn them over to you on your claim against them. I will pay you the balance as soon as I can. This handles me kind of rough, but will have to pay for it. My lawyer says that if you can say you sent to me to sell on commission, that you can have them." They, in their reply, dated May 21st, 1864, stated, "We don't consider the 10 tierces of salmon yours, and shall claim them as consigned goods on commission."

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They also direct him to a lawyer to act for them and to take possession of the salmon, and say "all you need say is that you consider them our property." On the same date, they wrote him another letter as follows: "We sent you ten tierces of salmon to sell for us, and we claim they are our property. You will please hand them over to Messrs. Jed, Fry & Co. on our account, and we will hold you harmless. You know they are not yours, and no one has any claim on them. You must not allow other parties to get our property."

On the 25th of May, following, plaintiffs gave defendant notice that the goods were their property. The defendant, nevertheless, asserted his right to take and to retain the goods, under the attachment above mentioned, as well as several others subsequently issued to him against the property of Curtis.

Upon the trial, a verdict was rendered in favor of plaintiffs for the value of the goods.

Defendant appealed to the court at general term.

A. J. Vanderpoel, for appellant.

F. R. Sherman, for respondents.

BY THE COURT.*—ROBINSON, J.—The payment of the price for these goods was to be made "on arrival" of the goods in New York, and it cannot be doubted, that while they remained in the custody of the common carriers, on their wharf in New York and in course of transit, the purchaser having failed, the plaintiffs (the vendors) not having been paid, were legally entitled to reclaim possession of the goods. No possession having been taken by the purchaser, no title could pass to any one claiming in his right, until payment on arrival was made. The right to such payment had in no manner been waived, either by having suffered the goods to go into the control of the purchaser, or by allowing him time for payment. The right, as owners, existed in the plaintiffs when the goods were seized

* Present, ROBINSON, LOWE and J. F. DALY, JJ.

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by the defendant, and when notice was given him of their title to the goods (*Hicks v. Cleveland*, 39 Barb. 573).

The question as to the right of stoppage *in transitu* is not presented by the case, but one solely of the right of the vendors to reclaim their property while in the hands of common carriers of goods, when, by the executory contract of sale in pursuance of which they were shipped, the price was to be paid on arrival, and no payment was made or offered.

But, without regard to this question of the absence of any title in the purchaser, until payment on arrival, he had, previous to this purchase, or immediately after, failed in business, of which fact the plaintiffs were ignorant when they shipped the goods, and for this reason they had a right, in default of payment of the price, to reclaim the goods from the common carriers or from the hands of any creditors or voluntary assignees of the purchaser, merely acting in his behalf or in the exercise of such rights as he possessed. The ruling of the judge on the trial, in this respect, was correct, and the verdict should be upheld. But if the right of the plaintiffs to reclaim the goods was merely that of stoppage *in transitu*, it was in that respect perfect.

The purchaser had never acquired actual or constructive possession of the goods, and after being apprised of their seizure by the defendant, did not act so as to confirm such possession, but, on the contrary, did his utmost to protect the interests of the plaintiffs, even to suggesting they should untruly claim the goods had been sent him for sale on commission; to which they unscrupulously yielded. Such act, however, did not mislead any one, and it cannot be denied that the plaintiffs, as against the purchaser, had a right to regain the possession of the goods. Defendant, however, claims that their power to reclaim them had been destroyed by his having taken possession of the goods under the attachment against the purchaser, and, as legal representative or assignee *in invitum* of his rights; and also, that any such special lien for the unpaid purchase money was waived by plaintiff's demand of the goods, instead of the amount of the lien on them for the unpaid purchase money.

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The right of stoppage *in transitu* is not strictly one of lien, although frequently styled one of *equitable lien*, because possession of the goods having been surrendered to the common carrier for delivery to the vendee, without condition or restriction in favor of the vendor, he is neither actually nor constructively agent for the latter. The right is not to *retain*, but to *regain*, possession, and where it exists and is asserted, the title to the property and right to its *possession* is reinvested in the person in whom such right of stoppage exists (Story on Sales, §§ 284, 319).

The power which the purchaser has of taking possession of the property from the hands of the common carrier, and thus determining the right of stoppage *in transitu*, cannot, it seems, without his direct intervention, be exercised by or on behalf of a creditor by way of levy under attachment upon his interest. "The vendor's power of intercepting the goods is the elder and preferable lien, and is not superseded by the attachment." The process does not proceed on the ground of defeating this prior right, but simply to acquire such as was already vested in the debtor, and his voluntary assignment made with knowledge that the purchaser is unable to pay for the goods, is fraudulent as against such rights of the vendor (*Smith v. Gross*, 1 Camp. 282; 2 Kent Com. 551; *Harris v. Pratt*, 17 N. Y. 249).

Buckley v. Furniss (15 Wend. 137), is very similar, in all its features, to the present case, and maintained the principle that such right was not divested by an attachment or seizure of the goods at the suit of a creditor of the purchaser before the *transitus* or delivery into the actual or constructive possession of the vendee was at an end, and that the officer and attaching creditor were trespassers. The claim made in that case, by the sheriff, on the part of the attaching creditor, to exercise the right of a debtor to extinguish the right of stoppage *in transitu* and to take absolute possession of the property, although not presented (so far as shown by the report) for distinct consideration, was, in effect, negatived by the decision in that case, and would seem unsustainable on principle.

The circumstances of a sale on credit, and delivery to a common carrier, qualified by the right of reclamation, in case

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of the failure of the purchaser, not only reserve the right of stoppage *in transitu* to the vendor, but leave a *locus poenitentiae* to the debtor (his possession being incomplete) to decline to be guilty of accepting the property from the common carriers with knowledge of his inability to pay for it. He may (as did the vendee in this case) refuse to accept the goods, and in doing all he could to restore them to the vendor (as was said in *Stuyvesant v. Orser*, 24 N. Y. 544), "he acted with honesty which ought to be encouraged and commended, not overreached and nullified, by technical rules at variance with equity and common justice."

These terms of commendation cannot be fully applied to the parties to the purchase of the property in controversy, as their private correspondence showed a want of integrity, in their readiness to resort to subterfuge and falsehood; but as such demonstration in no way influenced the action of the defendant, it cannot be held to vary or modify the rights in the property in question which then existed, and which have in no manner been waived or released.

A purchaser of property *in transitu*, by his omission to take possession or to pay the purchase money, defeats the right of his creditor's attachment as against the vendor's right of stoppage *in transitu* and reclamation of the goods.

The creditor can only make his process available by payment of the purchase money.

These views were most ably presented in the decisions and charge of the learned judge on the trial, and no error is discovered in the matter of any of the exceptions taken which should require a new trial.

The judgment should be affirmed with costs."

Judgment affirmed with costs.

Carpenter v. Goodwin.

WILLIAM C. CARPENTER v. LANDON R. GOODWIN.

In an action on a judgment, the defendant will not be permitted to show, under a general denial, that the judgment sued on was, subsequent to its entry, vacated by order of court. The vacation of the judgment should be specially pleaded, as matter in avoidance.

Where such an order is put in evidence, under a general denial, in a suit on the judgment, and no application is made to the court at the trial to amend the pleadings, the judgment will, on appeal, be reversed, and the court will refuse to disregard the defect, or to order the amendment to be made *nunc pro tunc*.

APPEAL from a judgment of this court, entered on a decision of the court at a trial before Judge VAN BRUNT, without a jury. The facts are stated in the opinion.

F. H. B. Bryan, for appellant.

R. W. Van Pelt, for respondent.

BY THE COURT.*—ROBINSON, J.—The claim in suit was founded upon a judgment alleged in the complaint to have been given and entered in the Supreme Court, on the 7th day of January, 1868. The suit was commenced in March, 1868. The answer, served in July, 1868, simply denied each and every allegation in the complaint. On the trial, a judgment roll was produced and given in evidence, establishing the recovery of the judgment as alleged in the complaint.

Defendant then offered in evidence an order of the Supreme Court, made or dated April 29th, 1868, vacating the judgment, which was objected to: 1st, because made subsequent to the commencement of the suit, and inadmissible under the answer; 2d, that it could only be admitted on order and by way of supplemental answer.

It was, however, admitted in evidence against the objec-

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

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tions, and plaintiff excepted. Being thus proved, judgment was given for defendant, from which this appeal is taken.

In the admission of this testimony there was an error.

It is true, the Code allows the defendant, by answer, to make available as a defense whatever has transpired previous to its being interposed.

This is contrary to the former rule, by which the pleadings all had reference to the state of facts existing at the date of the declaration in the action, and a defense thereafter arising could only be specially pleaded (*Boyd v. Weeks*, 2 Den. 321).

Under the Code, however, the validity of the pleading is to be tested, as to the state of facts when it is interposed (*Beals v. Cameron*, 3 How. Pr. R. 414; *Willis v. Chipp*, 9 Id. 568).

The issue being alone as to the alleged recovery of the judgment, the general denial could only allow proof as to that fact, and, in no way, presented any question as to the judgment having been subsequently vacated. The plaintiff established his case by production of the judgment roll, and defendant was allowed against objection and exception to maintain a defense in no way suggested by way of answer by introducing the subsequent order vacating it. This order constituted no part of the judgment roll. Section 281 of the Code directs that the clerk, immediately after entering judgment, shall attach together the following papers (sub. 2), the complaint having been answered: "the summons, pleadings or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment, *which shall constitute the judgment roll.*"

The order subsequently entered, vacating the judgment, constituted no part of the judgment roll, but was "an order affecting a substantial right, made upon a summary application in an action after judgment," and was, in itself, the subject of a separate appeal from that which might be taken to the Court of Appeals from the judgment (Code, § 11, sub. 3).

Being of subsequent occurrence, it depended for its validity upon other considerations than the mere fact of the making and entry of the judgment, at the time and to the

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effect alleged, and if the defendants, when answering the complaint, had intended to present the subsequent *vacation* of the judgment, that fact should have been specially pleaded.

The court having, so far as appears, jurisdiction in the action, the judgment, once perfected, however irregular in form or entry, was not void, but only *voidable*, and any matter of allegation, attacking directly or collaterally its force or effect, or its right to "full force and credit," ought to have been specially pleaded.

The court on the trial, even if the power existed, was not asked to allow the amendment to the pleading, interposing any such new and distinct defense, and it was not in its power to allow the introduction of evidence of such undisclosed ground of resistance to the plaintiff's claim, and thus "conform the pleadings to the facts proved" (Code, § 173).

Although, on a trial, immaterial variances in the pleadings and proof may be disregarded (Code, § 169), still, if objection be taken, a change in the pleading "changing substantially the claim or defense" can only be made upon such terms "as shall be just."

In the present case no application was made or allowed to amend the answer, by adding this new defense, and evidence to establish it is inadmissible.

A judgment in an action must be warranted by what has been alleged and proved.

In *Wright v. Douglass*, 25 N. Y. 270, the court says, "The whole scope of the provisions of the Code in respect to pleadings and amendments thereof, implies that all the material allegations of the plaintiff or defendant shall be spread on the record, shall be actually inserted in the pleadings, and when variances are disregarded, it is upon the principle that they may be amended *nunc pro tunc* at the trial, and the court will so order to perfect the record, so that it shall show the questions really litigated and decided. The principle still remains that the judgment to be rendered by any court must be *secundum allegata et probata*; and this rule cannot be departed from without inextricable confusion and uncertainty and mischief in the administration of justice. Parties go to court to

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try the issues made by the pleadings, and courts have no right *impromptu* to make new issues for them on the trial, to their surprise or prejudice, or to find judgment *not put in issue and distinctly and fairly litigated.*"

Upon these views, the admission in evidence of the subsequent order vacating the judgment without answer, asserting such special avoidance of its legal force and effect, was clearly inadmissible, and the judgment should, for this reason, be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

HORACE TUTTLE AND HENRY MARTIN v. PATRICK HANNEGAN.

The defendant sold a milk route, together with the good will, &c., and agreed that he would not, for three years, sell to any of the customers on the route.

Held, in an action for damages for a breach of the agreement, that evidence of loss of customers and diminution of daily profits was properly admitted in evidence on the question of damages.

Where defendant in such a case gave a writing in the form of a bond, but not under seal, by which he covenanted not to interfere with the milk route, *Held*, that the remedy of the plaintiff for a breach was not restricted to an action on the bond; but he might sue on the verbal agreement, and the writing was admissible in evidence at the trial.

APPEAL from a judgment in favor of plaintiffs for \$492 75.

In this action the complainant alleged that the plaintiffs were co-partners, engaged in selling milk; that on November 15th, 1866, they purchased of the defendant for the sum of \$1,000, one horse and wagon, and the appurtenances and the good will of a milk route in the city of New York, and paid him that sum therefor; that the defendant agreed with the plaintiffs that he would not, for and during the term of three years from November 15th, 1866, in any way or manner serve, supply, or sell, or cause to be served, supplied or sold, by any

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person or persons on his behalf, milk to any of the customers on that route. It set forth a breach of that agreement, and alleged generally damages in \$1,000.

The answer was a general denial of all the allegations of the complaint, excepting the sale and delivery to the plaintiffs of the horse and appurtenances and milk route.

On the trial plaintiffs offered in evidence a writing, not under seal, but in the form of a bond for \$1,000, made to the plaintiff, Martin, conditioned for the performance of the agreement alleged in the complaint.

Defendant objected to its admission, on the ground that the action should have been brought for breach of covenant in that instrument; that the plaintiffs could not maintain this action with that instrument in existence.

Subject to defendant's exception, however, the instrument was admitted.

Defendant also excepted to the proof offered of loss of customers and of the daily profits of the milk route, through the acts of the defendant in drawing away customers.

D. McMahon, for appellant.

P. J. Sause, for respondents.

BY THE COURT.*—JOSEPH F. DALY, J.—The proof of damage given by plaintiffs on the trial was admissible; the loss of customers and loss of daily profits was the direct result of the defendant's breach of his agreement, that he would not supply milk to the customers on the milk route he had sold to the plaintiffs. The defendant argues that the correct rule of damage would be the difference between the contract price at which the defendant sold the property, and its actual value after the breach. It might well be that it was worth far more than the defendant sold it for; but, if so, the plaintiffs were entitled to the benefit of their bargain, and the defendant has no right to reduce the value of the property—by interfering

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ.

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with it, taking away customers, &c.—down to a sum equal to the contract price. The verdict rendered by the jury, of \$492 75, is less than, by some views of the testimony, might have been found as the loss sustained by plaintiffs, and, therefore, cannot be set aside as unwarranted by the evidence.

As to the admission in evidence of the writing at folio 37 of the case, the complaint sets forth, as the basis of the action, a promise or agreement, which is substantially the same as that contained in the writing, under the form of a condition of a bond. The writing itself is not a bond, and is of no higher character than a simple agreement. Not being under seal, it cannot be regarded as an instrument of higher character into which the parol contract of the parties was merged. The plaintiffs were not bound, therefore, to bring their action upon it, but had the right to plead the parol agreement, and offer the writing in evidence to sustain their case. The exceptions to its admission, and to the admission of evidence after it was in the case, were not well taken. It is true that the writing showed an agreement with the plaintiff, Martin, alone; but the answer admits the sale of the property to the plaintiffs—the horse and appurtenances and milk route; and the evidence shows that Martin acted for the partnership, and he and the other plaintiff as the real parties in interest, had the right to bring the action. Finally, the writing itself purported to be a bond in the penalty of \$1,000; and the plaintiffs claimed no more than that sum as damages, and recovered much less.

The judgment should be affirmed, with costs.

Judgment affirmed.

Gray v. Redfield.

JOHN GRAY v. CHARLES REDFIELD.

The provisions of 3 Rev. Stat. 270, § 72 (5th ed.), which provide that no injunction shall issue to stay proceedings at law in a personal action after judgment, unless a sum of money shall be deposited, and a bond given as therein directed, apply to a suit brought in this court to restrain the collection of a personal judgment rendered in one of the District Courts; and a compliance with the statute is necessary to give the court jurisdiction to grant a preliminary injunction.

APPEAL by defendant from an order of the special term, made April 13th, 1869, denying the defendant's motion to dissolve a preliminary injunction restraining the collection of a judgment for \$57, entered February 19th, 1869, in the Seventh District Court of New York city, in favor of the defendant against the plaintiff.

C. Patterson, for appellant.

S. B. Noble, for respondent.

BY THE COURT.*—JOSEPH F. DALY, J.—Upon applying for the preliminary injunction in this action, the plaintiff did not deposit the amount of the judgment and costs, nor give the bond, as required by the Revised Statutes (R. S. part 3, chap. 1, tit. 2, art. 5, § 140).

A compliance with this statute was necessary to give this court jurisdiction. This has been held in the Superior Court and in this court, where it is settled that the provisions of the statute in that regard are not abrogated by the Code (*Cook v. Dickerson*, 2 Sandf. 691; *Carpenter v. Keating*, decided at December, 1870, general term of this court, not reported).

The order appealed from must, therefore, be reversed.

Order reversed.

* Present, ROBINSON, LARREMORE, and J. F. DALY, JJ.

Unger v. The People's Fire Insurance Co. of New York.

LOUIS UNGER AND ANOTHER v. THE PEOPLE'S FIRE INSURANCE
Co. OF NEW YORK.

SAME v. THE NEW AMSTERDAM FIRE INSURANCE Co.

The defendants' policy of insurance provided that all fraud or attempt at fraud by false swearing or otherwise, on the part of the insured, should cause a forfeiture of all claim under the policy. *Held*, in an action for a loss under the policy, that the fact that the plaintiffs in their preliminary proofs of loss and in their testimony on the trial, swore that their loss was a great deal—*e. g.*, one half—more than it was found to be by the referees to whom the issues in the action were referred, is not even presumptive evidence of false swearing or of fraud on the part of the insured, within the meaning of the policy.

In such a case, the plaintiffs have the right to testify as to what they believe to be their loss, and no matter how much that may exceed their recovery in the action, fraud will not be deemed to be established, unless it appears: 1. That there were no such goods of such value destroyed, and 2. That the insured knew, or must have known, the fact when they swore to their preliminary proofs of loss.

Where, on the trial of an action on a policy of fire insurance, the plaintiffs swear to their loss at a certain fixed sum, and the defendants introduce circumstantial evidence to show that it could not have been more than a certain smaller sum, *it seems* the referee or jury is not bound to adopt either estimate, but may give a verdict for an intermediate sum, and *Held*, if it is an error, it is one of which the plaintiff alone can complain.

APPEALS from judgments of this court entered in favor of the plaintiffs, January 21, 1871, against the People's Insurance Company, for \$2,646 76; the New Amsterdam Company, for \$3,114 61.

The judgments were entered upon the report of referees. Each action was referred to three referees, one, a lawyer, was appointed by the court, and one chosen by the defendants and one by the plaintiffs.

The property insured was contained in the building 503 and 505 Broadway, in this city, and consisted of a stock of ribbons, fringes, &c., &c. The policy of the People's Company was \$2,500, that of the New Amsterdam was \$3,000. There were policies in two other companies; the Merchants' & Mechanics',

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for \$2,500, and the Western for \$3,000. Total insurance, \$11,000, of which \$400 was upon office furniture, leaving \$10,600 upon the stock. The plaintiffs claimed that their loss exceeded the total of all the policies together, and therefore demanded the total amount of each policy from the company issuing it. The plaintiffs, in their preliminary proofs of loss, claimed that the actual cash value of the property insured was \$16,336 23, and that their loss amounted to that sum, being \$9,989 03 for property totally destroyed, and \$6,347 20 for property damaged. The defendants claimed that the whole loss did not exceed \$4,600, and set up, as a bar to recovery, that the plaintiffs, in their said sworn proof of loss in claiming it to be \$16,336 23, were guilty of fraud, attempt at fraud and of false swearing, which avoided the policies according to a stipulation in the policies against fraud, attempt at fraud and false swearing.

The referees found that the total loss was \$9,172 88, instead of \$16,336 23, which loss was made up of total loss, \$6,500; damage to goods, \$2,600 15; empty boxes, \$72 73; making a total of \$9,172 88. They therefore awarded against each company damages on its policy proportioned to the total loss and total insurance: so that against the People's Co., on its policy of \$2,500, the award was \$2,163 42 and interest, and against the New Amsterdam Co., for its policy of \$3,000, the award was \$2,596 09 and interest.

From the judgments entered on the report of the referees, the insurance companies appeal.

Howard Ellis, for appellants.

Geo. C. Barrett, for respondents.

BY THE COURT.*—JOSEPH F. DALY, J.—The plaintiffs were their own chief witnesses to prove their loss. They swore it up to the sum of \$9,989 03 for goods totally destroyed (exclusive of damage to goods partially destroyed, which had been by arbitration fixed before the judgment at \$2,600 15). The referees

* Present DALY, CH. J., LARREMORE and J. F. DALY, JJ.

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found the value of the goods totally destroyed at \$6,500. The fact that the plaintiffs in their preliminary proofs, and in their testimony on the trial, swore that their loss was about \$3,489 03 more than the referees found it to be, is not even presumptive evidence of false swearing or of fraud. If it were, then it would be dangerous for the insured to make in any case a claim of loss, or to attempt to prove it in court, lest the referees or jury should find for them less than they claimed, and their policies be avoided. They have the right to testify to what they believe to be their loss, and no matter how much that may exceed their recovery, no fraud can be predicated of a result which is due to the judgment of the tribunal alone, unless two points be established against them: *i. e.*, that there were no such goods of such value destroyed; and that the insured knew, or must have known, the fact when they swore to their preliminary proof of loss; otherwise it is the misfortune and not the crime of the claimants that the court or jury refused to award them the full sum they swore to. The report of referees or verdict of a jury for a lesser sum, when based on evidence sufficient to support it, is deemed conclusive for the purposes of the particular action as to the actual loss, whether the finding be attacked by the insured or the insurer, but it is not conclusive of false swearing or fraud, particularly where it is not based on positive testimony as to that amount, and that only given in contradiction of the insured. The evidence offered by the defendants of the loss was circumstantial, and did not conclusively establish the *impossibility* of there being goods destroyed as claimed by the plaintiffs. Under such circumstances, there was nothing to sustain a finding of false swearing or fraud, and the referees in these cases might properly find the contrary.

It is no objection to the report and judgment that the referees found for the plaintiffs less than the latter positively swore to. The defendants offered evidence as to the loss being at most not more than \$4,600. They did this by a number of witnesses who swore to the extent of the fire, its slight character, the position and condition of the goods found after it, the damage to the bins, shelving, &c., where the goods were alleged to be when the fire took place, the size of the store or room, &c., &c.,

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all which tended to show that the loss claimed by plaintiffs was improbable. All these were probably taken into consideration by the referees, and due allowance made for them, resulting in the finding of a smaller loss, and the award cannot be therefore said to be an arbitrary compromise, or guess-work, or without evidence to support it. The point has been discussed in the courts before, in cases where the jury has found even a smaller sum, proportionately, than in this case against a larger claim by the insured. It has been held to be no objection to the verdict, and to be an error, if an error, of which the insured alone can complain (*Wolf v. Goodhue Ins. Co.* 43 Barb. 400).

The referees certainly had evidence before them to sustain their finding, and even to sustain a finding for a larger amount. If they had found for the whole claim of the plaintiffs, the defendants would, according to their own argument, have had less to complain of, since the only two points of law relied on by them, viz.: fraud and false swearing, and a compromise finding, would have been out of the case. It is no objection to the recovery that it was for a lesser sum than claimed, so long as the plaintiffs do not appeal from it.

I cannot see, under the common practice and course of decisions in the courts, how we can review the finding on the conflicting testimony. The plaintiffs are made competent witnesses by statute, and the referees have the right to credit their evidence. The considerations urged by the defendants on the appeal are more proper to be addressed to the referees than to the appellate court. Whatever suspicion attaches to the statement of the plaintiffs, because it was given after the adjournment, when they might have committed to memory their preliminary proofs of loss, and rehearsed them as the result of refreshed recollection or original effort of memory, is disposed of by the fact that the referees chose to believe them, after seeing and hearing the witnesses themselves, and being convinced of their truthfulness, or, at least, of their honest intention to be truthful. I should be the more unwilling to disturb the finding, because the tribunal before which the issues were tried was constituted so as to afford good guaranties for its impartiality. There were three referees—one named by each of the parties, and one

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by the court. It was as reliable a tribunal as any jury box. If such findings are to be questioned, because there is a conflict of evidence, it would be difficult to say where and from what source an impartial judgment could be obtained.

The judgments should be affirmed.

Judgment affirmed.



ELISHA CROWELL v. SILAS CRISPIN.

An officer of the Government is not responsible upon a contract made by him officially, in the discharge of his public duties, unless he expressly engages to be answerable, or the circumstances are such as to show that he intended to bind himself personally.

He is not bound, even in cases where, by the terms of the contract, he would be, if the agency were one of a private nature, the reason being that it is not to be presumed that a public officer intends to bind himself personally when acting as a public functionary, or that the party dealing with him in matters relating to his public duties means to rely upon his individual responsibility.

The captain of a vessel lying at New Orleans, received on board his vessel, from the Mississippi Valley Transportation Co., who had brought them from the United States arsenal at St. Louis, goods consisting of saddles, muskets, carbines, pistols, arms and accoutrements, consigned to the defendant, an officer of the ordnance corps of the United States army, at the Continental stores, Brooklyn (a storehouse for goods belonging to the United States). The goods were landed under the supervision of superintendent of the ordnance department, were taken away in carts at the dock under the direction of the armorer, and were received by a clerk at the Continental stores. By defendant's direction, a bill for the freight was made out to the United States, and was partly paid by the ordnance department. *Held*, that the facts being sufficient to inform the plaintiff that the goods belonged to the United States, and that the defendant was merely an officer in its service, the defendant could not be made liable, personally, for a balance due for the freight.

APPEAL from a judgment of the general term of the Marine Court, reversing a judgment at a trial term of that court in favor of the plaintiff.

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This action was brought by the plaintiff, part owner and agent for the other owners of the brig *Josie A. Devereux*, to recover the freight on a quantity of guns and pistols from New Orleans to the Continental stores in Brooklyn. The complaint alleged that the goods were transported and delivered to defendant, and that he received them, and agreed to pay the freight.

The answer set up two defenses: 1. A general denial, and 2. That defendant was an agent for the United States, and on its behalf, and as its agent, received the arms in question; that all the acts which he did in relation to the matter were done by him on behalf of his principal, and that he never promised to pay the freight.

On the trial the facts appeared as stated in the opinion, and plaintiff had judgment, which was reversed by the Marine Court at general term, and plaintiff appealed to this court.

Starr & Ruggles, for plaintiff, appellant.

I. The only question is, what is the intention of the contracting parties, and this must be collected from the circumstances of the case (*Walker v. Swartwout*, 12 Johns. 443; *Gill v. Brown*, Id. 385; *Sheffield v. Watson*, 3 Caines, 69). It is the duty of an agent to disclose the character in which he acts.

II. In all the cases where public agents have been exonerated from personal liability, their public official character has been disclosed, and to avoid personal liability, any agent, whether public or private must declare his agency (*Rathbon v. Budlong*, 15 Johns. 1; *Bronson v. Woolsey*, 17 Id. 46; *Olney v. Wickes*, 18 Id. 121; *Fox v. Drake*, 8 Cow. 191; *Belknap v. Reinhart*, 2 Wend. 375; *Macbeath v. Haldiman*, 1 Term R. 172; *Paley on Agency*, 376).

III. Where such agency is not disclosed, it may be presumed, fairly, that the credit was given to him personally (*Story on Agency*, § 306).

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W. Stanley, for respondent.

I. The defendant was an agent for the Government, the principal in the transaction, and there is no ground for charging the defendant with the debt, in relation to which he acted solely as agent. The plaintiff's remedy is against the United States (*Rathbon v. Budlong*, 15 Johns. 1; *Walker v. Swartwout*, 12 Id. 444; *Bronson v. Woolsey*, 17 Id. 46; *Olney v. Wickes*, 18 Id. 121; *Hodgson v. Dexter*, 1 Cranch, 345; *Fox v. Drake*, 8 Cow. 191; *Belknap v. Reinhart*, 2 Wend. 373).

II. A public agent is not personally liable on contracts made by him in the discharge of his public duties, unless it appears that he intended to bind himself (*Osborne v. Kerr*, 12 Wend. 179; *Nichols v. Moody*, 22 Barb. 611). In relation to public agents, no implied promise can be presumed (*Nichols v. Moody*, 22 Barb. 611).

BY THE COURT.*—DALY, CH. J.—An officer of the Government of the United States is not responsible upon contracts made by him officially in the discharge of his public duties, unless he expressly engages to be answerable, or the circumstances are such as to show that he intended to bind himself personally (*Nichols v. Moody*, 22 Barb. 611; *Walker v. Swartwout*, 12 Johns. 444; *Belknap v. Reinhart*, 2 Wend. 375; *Hodgson v. Dexter*, 1 Cranch, 345; *Girley v. Lord Palmerston*, 3 Brod. & B. 275; *Macbeath v. Haldiman*, 1 T. R. 171). He is not bound even in cases where, by the terms of the contract he would be, if the agency were one of a private nature, the reason being that it is not to be presumed that a public officer intends to bind himself personally when acting as a public functionary or that the party dealing with him in matters relating to his public duties, means to rely upon his individual responsibility (Story on Agency, § 302, and cases there cited; 2 Kent's Com. pp. 632, 633, 4th ed.).

All that appears in respect to the contract in this case, is what is disclosed upon the face of the bill of lading; the fact that the property had been stored in the United States arsenal

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of St. Louis, and that the freight claimed by the plaintiff, was for the transportation of it from St. Louis to New Orleans by railroad, and from thence by the plaintiff's vessel, to the city of Brooklyn. The bills of lading contain an enumeration of the contents of each box, showing that the property consisted of saddles, muskets, carbines, pistols, arms and accoutrements, and in the plaintiff's bill for the freight, it is described as consisting of ordnance stores and saddles, which, in view of the place from which it came, the United States arsenal of St. Louis, was a very clear indication from the beginning, to the plaintiff or his agents, that it was property belonging to the United States; the more especially as each box was marked, "Col. S. Crispin, Continental Stores, Brooklyn," which, as was shown by the evidence, was a storehouse for goods belonging to the United States.

It was proved upon the trial that the defendant was a major, with the rank of brevet-colonel in the ordnance corps of the United States army, and the property transported was not his individual property, but was the property of the United States. It does not appear that he ever saw the bill of lading; all that was proved being that, when called upon for the freight (whether before or after the delivery of the property from the vessel did not appear), he directed the plaintiff to make out his bill in the manner in which it was made out and presented for payment to the chief clerk of the United States ordnance agency in this city; that is, as follows:

"Col. Crispin:

"U. S. Ordnance Department, UNITED STATES, to brig Josie Devereux and owners.

"E. CROWELL, Agent for brig, &c.

"1869, Feb'y 20, for freight, &c., &c."

The greater part of the bill was paid; in fact, nearly the whole of it but \$487, which was refused on the ground that the report from the storehouse declared that a number of the pistols were short, not being delivered, the boxes being in bad order. An amount sufficient to cover the loss was deducted from the freight, and the residue of the bill was paid, and it was for the recovery of this amount, as upon his personal contract, that the defendant Col. Crispin was sued in the court below.

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Upon this state of facts, and this was all that appeared, there was not the slightest ground for holding the defendant responsible for the payment of this freight. There was nothing but the fact that he was named in the bill of lading. The moment his attention was called to the claim for the freight, he directed the bill to be made out against the United States, and the plaintiff complied with that direction and presented it, so made out, to the officer of the United States who was authorized to pay it, and who did pay the principal part of it.

By no act of the defendant, or any one acting on his behalf, or by his authority, did he ever do or say anything indicating any intention to be personally responsible for the payment of this freight, or which would warrant the plaintiff in acting upon the assumption that the defendant was or would be personally answerable. If the master had refused to deliver the goods and part with his lien upon them for the freight unless he was paid, and the defendant had led the master or owner to do so, by promising to pay it himself, it would have been a very different matter. But nothing of this kind appeared. The goods were not in fact delivered to him directly; they were landed under the supervision of the superintendent of the ordnance department, were taken away in carts at the dock, under the direction of the armorer, and were received by a clerk at the Continental store, whose duty it was to receive stores. The defendant was probably the officer in command at the stores, but beyond that, and the fact that the property was consigned to him by name, to be delivered at the Continental stores, and that he directed the bill for the freight to be made out against the Government, he had nothing to do with their delivery. If the plaintiff, therefore, parted with his lien by the delivery of the goods, it was his own voluntary act, or that of his agents, and he has no right to hold the defendant answerable because he lost his lien by delivering the property. He must look to the Government of the United States for the payment of the balance of his bill, and cannot recover it against the defendant. The judgment of the general term of the Marine Court should be affirmed.

Judgment affirmed.

Muldoon v. Pitt.

BERNARD MULDOON v. WILLIAM PITT AND OTHERS.

Under the mechanics' lien law, for New York city (Laws of 1863, ch. 500), the "owner" intended is the owner of the erection, and not of the lands on which it is placed.

The lessee of premises in New York city, holding under a lease covenanting that no alterations should be made except by the written consent of the lessors, wished to make certain alterations, but the lessors refused permission unless they were made in a certain way. By the lessee's consent and direction, therefore, the lessors superintended the work and gave directions concerning it. *Held*, that they did not thereby make themselves liable to the contractor who did the work, for an unpaid balance due him from the lessee.

APPEAL from a judgment of this court, entered on the report of a referee in a proceeding to foreclose a mechanic's lien.

The proceedings were had under L. 1863, ch. 500, providing for mechanics' liens in the city of New York, and resulted in a judgment in favor of the plaintiff, from which defendants appealed to the court at general term.

The facts are stated in the opinion.

Arnoux, Rich & Woodford, for appellants.

Comstock Bros., for respondent.

BY THE COURT.*—DALY, CH. J.—There was no ground whatever for the judgment against the appellants Charles and William Pitt. They were the owners of the premises. The defendant Vierkant applied to them for a lease of the premises for a Russian bathing establishment. The premises were not fitted for such a purpose at the time, and Vierkant was to put up the requisite building and make the necessary alterations at his own expense. The defendants, at first, did not want to let the premises for such a purpose, but finally consented, upon Vierkant agreeing to do whatever they wanted in the new building he was to erect; to build such a roof as they desired, and to

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ

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put up the building and make the necessary alterations, subject to the approval of one of them, William Pitt. Vierkant was to make the plan and submit it to William Pitt, and if it suited him, it was to be "all right."

With this understanding, they leased the premises to him for a period of five years, and he made a contract with the plaintiff to do the necessary work. The lease contained a covenant that no alterations should be made in the premises, except in the basement floor and cellar, without the written consent of the appellants. The plaintiff himself testified that he was employed by Vierkant, he (the plaintiff) "thinking" at the time that "he was the man who had the right to do so." A Russian bath-house was to be built in the rear of the lot. Vierkant gave the plaintiff a description of it, and asked what it would cost; and the plaintiff said about \$1,800 or \$1,900. The plaintiff asked him how he was going to pay for it, and Vierkant replied that if the plaintiff wanted four or five hundred dollars a week, he would let him have it as the work progressed.

The day after the plaintiff commenced the work, William Pitt came to the premises, and told the plaintiff that Vierkant had not submitted the plan to him, and that he did not know anything about how the bath-house was to be built; that the work must be done to suit him, and that he had all to say about it; that it must be done to suit him, or that it could not be done at all. An interview had taken place between William Pitt and Vierkant, in which Pitt told him how he must build; and that before he built, he must show him (Pitt) the plan. Pitt indicated the kind of roof that must be built, and Vierkant told him that he was inexperienced; that he had never built anything in this country, and asked him if he would not go to the premises sometimes, overlook the work, and see that it was well done, as he (Pitt) knew better than he did. And accordingly Pitt went there generally twice a day. Both he and Vierkant gave directions, but Pitt was the "principal man" in doing so.

After Pitt had informed the plaintiff that the work must be done to suit him, the plaintiff spoke to Vierkant about it,

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and the latter told him, "Let it go. We will do it to suit him." The plaintiff followed the plan agreed upon between himself and Vierkant, except where Pitt gave different directions. Vierkant was in and out nearly all the time, and all that Pitt did was done with Vierkant's approbation. Vierkant testified that he told the plaintiff, after the work was commenced, that if Pitt wanted any change made, to do it.

There is no conflict in the testimony in respect to the facts above stated. Both Vierkant and Pitt agree that the bath-house was to be built, and the alterations made, at the expense of Vierkant, the lessee; and that Pitt was not to pay for any part of the work. Vierkant, therefore, was the owner within the meaning of the lien law (*Ombony v. Jones*, 19 N. Y. 234; *Walker v. Paine*, 2 E. D. Smith, 662). The word *owner*, as was said by Judge Comstock, in the first case above quoted, "as used in the statute, obviously refers to the erection, and not to the land on which it is placed; and if the land is owned by one person, and the building by another, it is only the title of the latter that can be affected by the lien." Here the contract was made by the plaintiff with Vierkant. He was the lessee. The bath-house was erected, and the alterations were made in the premises for him, and at his expense. He and not the lessors were to pay for what was done; and all that the lien could reach was his right and title to the use and enjoyment of the premises for the period during which they were demised to him.

No alterations could be made, by the covenants in the lease, without the written consent of the lessors. They had, therefore, the right to say, that what was to be done, must be done to suit them, and Vierkant not only recognized their right to limit or direct what he might do, but the personal supervision which one of them gave to the work during its progress, was done at Vierkant's express request, and for the protection of his interest, as well as the interest of the appellants, as he was a foreigner, who had no experience in building in this country. The judgment, therefore, in respect to appellants must be reversed.

Judgment reversed.

Butler v. Kellogg.

WILLIAM R. BUTLER v. CHARLES W. KELLOGG.

The defendant bought a heater of the plaintiff, on condition that it should heat his house in a certain manner. After it was put up, the defendant complained to the plaintiff that it did not heat his house as agreed, and plaintiff made certain alterations in it, after which the defendant made no more complaints. *Held*, that the defendant must be regarded as having elected to keep the heater, but he did not thereby lose the right to sue for a breach of warranty, or to show the extent of its diminished value, by way of abatement in an action for the price.

APPEAL from a judgment of the First District Court.

Action to recover the price of a heater sold by plaintiff to defendant, on December 12th, 1868.

Answer, that defendant agreed to buy the heater only on condition that it should warm his house throughout in the coldest weather, in a proper manner, and without heating the cellars. That the heater had, after a trial, failed to fulfil the conditions of sale, of which plaintiff had notice. On the trial the facts appeared as stated in the opinion, and plaintiff had judgment. Defendant appealed to this court.

E. D. Culver, for defendant, appellant.

R. W. Channing, for plaintiff, respondent.

BY THE COURT.*—DALY, CH. J.—That the furnace, when it came to be tested, in the winter of 1868 and 1869, proved entirely insufficient, was most satisfactorily established; but the weak point in the defendant's case is, that a witness on the part of the plaintiff, testified that in the autumn of 1869 he altered the furnace by encasing it with brick, and putting in a new pipe, and that after this was done he went to the defendant once or twice, and that the furnace worked well; that he heard no complaints after he made this alteration; but, on the contrary, they told him that it had improved and worked better.

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The winter of 1869 and 1870 was, as appears by the evidence, a more severe one than the winter that preceded it, and yet the defendant continued to use the furnace until the latter end of January, without any complaint. At least he has not shown that he made any, or that any was made, until the plaintiff sent his bill on the 29th of January, 1870. The defendant's son then replied by letter that the furnace did not warm the house on cold days, as stipulated, and that in the defendant's absence, he did not feel warranted in paying for it, or paying anything on account of it, and when the plaintiff's brother afterwards called to demand the money, the defendant's son told him that it did not warm the house as he had represented that it would, and told him to take it away.

Whether this statement of the son that it did not then warm the house was true or not, nowhere appears from any evidence offered on the part of the defendant. Neither the son nor any of the defendant's witnesses contradict the statement of the plaintiff's witness that the furnace worked well after the alteration was made; all their testimony as to its insufficiency, relates to its condition and working before the change was made, and their testimony fails in the most essential point, in giving no account of the result after the alteration.

If the defendant wished to rescind the contract, it was incumbent upon him, if the furnace upon cold days would not heat the house, after the alteration made in it, to have so notified the plaintiff; otherwise, he must be regarded as having elected to keep it, with the right to sue for the breach of the warranty, or show the extent of its diminished value by way of abatement in an action for the price (*Mondel v. Steel*, 8 Mees. & Wels. 858; *Street v. Blay*, 2 B. & Ad. 456; *Pomeroy v. Shaw*, 2 Daly, 267; Hilliard on Sales, 32.). If after the alteration, it was still insufficient, he should have notified the plaintiff promptly, and not have gone on using it as he did, not only until late in January, but throughout the whole of that winter.

He did not, by his letter in January, 1869, as he might have done then, rescind the contract; but it was a request to the plaintiff to examine the furnace, and if any improvements or suggestions were to be made, to give the defendant the benefit

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of them. This was an authority to make the changes or alterations which the plaintiff did make before the furnace was required for use in the following winter, and, if after this change the furnace was still insufficient, it was for the defendant to show it to entitle him to rescind the contract. What the defendant's son wrote to the plaintiff, or said to the plaintiff's brother, was a species of evidence which the justice had a right to consider as of little or no weight against the positive statement of the plaintiff's witness, that the furnace, after the alteration, worked well. The defendant might have been entitled to counter-claim something for the insufficiency of the furnace during the first winter of its trial, and that defense was set up in his answer; but he failed to give any evidence that would serve as a guide or measure by which the justice could reduce the amount agreed in the first instance to be paid.

The judgment should be affirmed.

Judgment affirmed.

PARDON BRIGGS v. JAMES R. SMITH, JR. AND OTHERS.

A clause in a copartnership agreement, by which the firm agreed to employ the plaintiff in a special capacity for five years, but in which the plaintiff was not named as a party, and which was not executed by him, *Held*, void as to the plaintiff, under the statute of frauds, and for want of mutuality.

Plaintiff sued to recover for services rendered at an agreed rate of compensation. Defendant settled the suit by paying a sum not stated. In a subsequent action to recover for services alleged to have been performed, under the same contract, *Held*, that it not appearing for what sum the settlement in the former action was made, the proceedings in that action were not evidence in the second action on the question of the rate of compensation agreed on between the parties.

It seems, that the active member of a firm, who manages the whole business, is entitled to dismiss any employee, who is not engaged under a valid agreement for a definite period; and if the latter persists in remaining, under the countenance and support of the dormant partners, he cannot maintain any action against the members of the firm jointly, and is limited to such remedy as he may have against those by whose request and authority he continues to render any service.

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APPEAL from a judgment of the Marine Court.

The complaint in the action alleged that the defendants, James R. Smith, Jr., William J. Gordon, George A. Fellows, Solomon D. McMillan, and Martin R. Cook, were, at the times thereafter mentioned, partners in the storage business, under the firm name of James R. Smith, Jr.

That such copartnership was entered into in accordance with an agreement in writing made between the defendants, dated April 29th, 1867, and to continue until May 1st, 1872.

That by said agreement it was provided that the plaintiff should be employed as superintendent and storekeeper in their business during the said term—to wit: from May 1st, 1867, until May 1st, 1872, at a salary of four dollars per day, Sundays included.

That plaintiff consented to the said agreement, and in accordance therewith, about May 1st, 1867, entered into the employment of defendants, as such superintendent and storekeeper, and duly discharged all the duties thereof until about March 24th, 1870, and had ever since been, and still was, ready and willing, and had from day to day duly offered to perform all the conditions of the said agreement and the duties of the said employment upon his part. That about March 24th, 1870, the defendant, Smith (who had the active charge and management of defendants' business), had refused, and still refused, to allow him to do so or to pay him therefor, from and after January 1st, 1870.

Judgment was demanded for the value of plaintiff's services from January 1st, 1870, to May 1st, 1870.

The defendant, Smith, the only one of the defendants served with process, put in an answer in which he denied that the partnership agreement, referred to in the complaint, had ever been executed on the part of the defendants, Gordon and McMillan, and denied that said agreement was ever legally executed. He admitted that plaintiff entered into the employment of himself and defendant Fellows, and continued so till August 8th, 1868, when he discharged him, and had never since employed him.

On the trial, which was before a judge without a jury, it

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appeared that, on April 29th, 1867, the defendant, Smith, was the lessee, for five years, from May 1st, of No. 15 State street, New York, and the other defendants were engaged in the wholesale grocery and commission business, in the city of New York, under the firm name of Gordon, Fellows & McMillan. On that day (April 29th, 1867), the defendant Fellows, with the knowledge and consent of the defendant Cook, but without the knowledge or consent of the defendants Gordon and McMillan, entered into an agreement with the defendant Smith (in which he assumed to act for the firm of Gordon, Fellows & McMillan, and signed the firm name), which set forth that Smith and Gordon, Fellows and McMillan became partners in the storage business, at No. 15 State street, for five years from May 1st, 1867. The agreement also contained a clause providing that the plaintiff should be employed as superintendent and storekeeper, at four dollars per day, Sundays included.

Plaintiff was employed as superintendent and storekeeper, at 15 State street, until August, 1868, when he was formally discharged by Smith, but refused to go.

He continued to remain and perform services, and subsequently sued all the defendants in this action to recover for his services from August, 1869, to January 1st, 1870. In that suit he claimed to have been employed at the agreed price of four dollars per day. That suit was settled by Smith giving his check for the claim, less a few dollars.

After January 1st, 1870, plaintiff continued to go to the store at 15 Front street, and to perform services, although against the wishes of the defendant Smith, and in the interest solely of defendants Fellows and Cook. On February 2d, 1870, however, Smith refused to allow him to be at the store, and locked up and retained the keys of the office which plaintiff had been accustomed to occupy.

On these facts, plaintiff had judgment against defendants Smith, Fellows & Cook, for his services from January 1st, 1870, to February 3d, 1870, at the rate of four dollars per day, the judge admitting as evidence of an agreed rate of compensation the proceedings in the former suit, which had been settled, and in which four dollars per day was claimed as the agreed rate.

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The judgment was affirmed by the Marine Court at general term, and defendant Smith appealed to this court.

James Crombie, for appellant.

J. F. Harrison, for respondent.

BY THE COURT.*—DALY, CH. J.—The copartnership agreement, though *ultra vires* as respects the firm of Gordon, Fellows & McMillan, was admissible, as tending, in connection with the other evidence, to show the existence of a partnership in the storage business between Smith, Fellows & Cook. The discharge of the plaintiff by Smith, in August, 1868, was subsequently waived by allowing him to continue his services, and by paying him down to January, 1870.

The agreement to employ the plaintiff for five years, whether founded upon the copartnership instrument, or the verbal engagement of Smith, Fellows & Cook was equally void (*Drummond v. Burrell*, 13 Wend. 308). The plaintiff was no party to the instrument, and therefore, as the judge then decided, there was a want of mutuality (*Haydock v. Stow*, 40 N. Y. Rep. 367); and the verbal agreement was void by statute, not being in writing.

But for services actually rendered he was entitled to recover their value (*Shute v. Dorr*, 5 Wend. 206; Browne on Statute of Frauds, p. 118); and as the plaintiff had been paid by the defendant for his services up to January, 1870, and was not formally discharged until February 2d, 1870, he was entitled to recover what his services were worth during this period. He himself testified that they were worth \$4 a day, and that he had been paid at that rate up to January, 1870; but he had been paid by the settlement of a suit which he had brought, founded upon an alleged agreement made upon the 29th of April, 1867, to employ him as superintendent and storekeeper at a salary of \$4 per day, which agreement, the defendant in this action, by the answer which he put in, in that, averred to have been

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put an end to by the discharge, on the part of the defendant, of the plaintiff, on the 8th of August, 1868, and that the defendant thereafter had been paid by the other defendants in that action. It was shown that that action was settled by the payment of the plaintiff's claim within a few dollars by the defendant's check; but that was not conclusive as respects the value of the plaintiff's services thereafter. It was a fact tending to show the value of his services, but was not evidence, as the judge below held, of an agreed rate of compensation, and did not preclude the defendant from showing that the services rendered therefor were not the same, or were not as valuable; for the express verbal agreement was void by statute, and, so far as the defendant was concerned, was put an end to by a formal discharge of the plaintiff on his part in writing. He may have continued thereafter performing exactly the same services, and, if he did, it would afford a foundation for an implied agreement on the part of the defendant, that his services should be continued at the same rate of compensation. But this was disputed upon the trial, and by no means appeared, even upon the plaintiff's own showing; for so far from acting thereafter as superintendent of the business, he acted, by his own admission, under the orders of a barkeeper whom the defendant had employed, and who was paid by the defendant individually, and not by the partners jointly. The defendant was asked if the plaintiff's services were not exactly the same after August 8th, 1868, when the defendant discharged him, as they were before, and his answer was "No. I don't know that it was. I had no confidence in him and *no communication with him respecting the business*;" and it was shown that the defendant was the active partner who attended to the business. The defendant further testified that when he discharged him on the 8th of August, 1868, he told him that if Gordon, Fellows & McMillan chose to keep him they might pay him to attend to their business, but he would not employ him or pay him, and it appeared by the testimony of one of the members of the firm, Cook, that he continued in some such relation. That firm, independent of the interest which two of its members, Cook and Fellows, had in the storehouse business, were in the habit of storing their

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goods there, the same as strangers, for which they had the defendant's personal receipts, and Cook testified, "We (in which he may be presumed to have referred to himself and Fellows) wanted to know the state of things; whether the business was paying; and we asked him (the plaintiff) frequently, how much goods they had there, and how much they were paying." That they asked him to see to their whiskey there, and keep a little lookout to see how things were going on in regard to their own goods and other goods in the store, and "whether, in his judgment, the business was paying," and various things, "and gave him directions to keep them advised of it;" and from his own testimony and that of the defendant and the barkeeper, he appears to have done little if anything, but this; for the defendant, who, as I have said, was the active partner who attended to the business, Fellows and Cook being dormant members, testified that after the 8th of August, 1868, he gave his instructions to the barkeeper: and the plaintiff testified that he generally got his orders from the barkeeper, and the barkeeper continued to give him orders, although upon his cross-examination he was unable to specify any particular instance, and the barkeeper swore that he was not aware of having given the plaintiff instructions or authority to do anything; but on the contrary that he told him on a certain occasion not to roll barrels to a particular place; that the defendant did not want them there, and that the plaintiff replied, "How are you going to prevent me?" All of this, which is uncontradicted, shows that he was then in the interest of Cook and Fellows, acting wholly independent of the defendant, and contrary to his wishes, and so the defendant describes him who swears, "He was sent there by Mr. Cook merely as a spy, to see what was going on in the store."

The whole of the testimony shows that he was there, after the 8th of August, 1868, without the defendant's consent, but with the approbation of the two dormant partners, to watch over their interest, and to keep them advised of what was going on. That the defendant acquiesced in his remaining, after he had given him a written notice of his discharge; and that he settled the suit brought to recover for his services up to January,

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1870, was not conclusive upon him, as he may very well have thought, there being two other partners, that it was not in his power alone to get rid of him. The plaintiff was, undoubtedly, of that opinion; and when the defendant again dismissed him, on the 2d of February, 1870, he took no heed of it, but continued there until the 9th of May, when he brought this suit to recover for his services up to that day; and learned, by the decision of the court below, that the defendant could and did put an end to his further service, by formally dismissing him on the 2d of February, 1870 (Collyer on Partnership, §§ 388–389). Indeed, the only fact recognizing the plaintiff's right to recover anything as respects the defendant, after the dismissal in 1868, was the payment by the defendant of the amount by which the suit for the plaintiff's claim to January, 1870, was settled. But it did not appear what that amount was. The testimony of the attorney is, that it was a few dollars less than the plaintiff's claim, which was at the rate of \$4 a day. Not being specified, it was indefinite, and not evidence, as the court below held it to be, of the agreed and exact rate of compensation thereafter. It was simply general evidence upon the question of the value of the plaintiff's service, but did not preclude the defendant from giving evidence upon that point. The agreement prior to August 8th, 1868, was not an exact guide, for the services afterwards were not the same. Any evidence, therefore, showing, or tending to show, both what the plaintiff's services were from December 31st, 1869, to the 2d of February, 1870, and what they were reasonably worth, was admissible.

The defendant's barkeeper was asked, "Were his services worth anything since the 1st of January, and if so, what?" This question was objected to, and the justice excluded it, not for any objection to the form of it, but because "there was evidence of an agreed rate of compensation." It was a proper question. The witness had shown, by his previous examination, that he was well informed of the nature of the services which the plaintiff had rendered in the general conduct of the business, and from his position was enabled to judge of their value, or, at least, no objection was taken to his competency in this respect, or that a proper foundation had not been laid.

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For this error the judgment should be reversed, and I feel relieved that we can dispose of the appeal upon this ground, as I by no means feel certain that the plaintiff was entitled, under the circumstances, to maintain an action against the defendant. The active member of a firm, who manages the whole business, is entitled to dismiss any employee who is not engaged under a valid agreement for a definite period; and if he persists in remaining, under the countenance and support of the dormant partners, I doubt if he can maintain any action against the members of the firm jointly, and if he is not limited to such remedy as he may have against those by whose request and authority he continued to render any service (*Willis v. Dyson*, 1 Starkie, 164; Collyer on Part. §§ 388, 389; 3 Kent's Com. 45). The difficulty in applying this, however, to the present case is, that the defendant recognized the service up to the 1st of January, 1870, and which, as the plaintiff continued on, would seem to involve the necessity of a formal dismissal thereafter.

For the reasons above given, the judgment should be reversed.

Judgment reversed.

GEORGE KOCK v. FRANCIS BONITZ.

To constitute an account stated, it is not necessary that there should be mutual or cross demands. They may be all on one side, or consist of charges and the acknowledgment of payment. The simple rendering of the items of an account between the parties, and the striking of a balance, or agreeing upon the amount due, is sufficient; and upon such a state of facts an action on an account stated may be maintained.

Where the plaintiff went over the account in the defendant's presence, and found a certain sum due to the plaintiff, and the result was not objected to by the defendant; *Held*, that this was an account stated.

Where an account is thus stated, it is usually conclusive upon both parties; but

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not absolutely so, unless there have been mutual compromises which operate as an estoppel *in pais*, but otherwise it is open to impeachment for fraud or mistake; but the burden of showing fraud or mistake is upon the party impeaching it.

Where parties have adjusted an account, have struck a balance and agreed upon the amount due, courts are exceedingly unwilling to open it again, unless there has been fraud, or it is very clear that there has been a mistake.

Where the pleadings will be conformed to the proof—stated.

APPEAL from a judgment of the Marine Court.

The complaint alleged a sale and delivery by plaintiff to defendant, on divers days between May 8th and August 22d, 1868, of goods for the price of \$350 50, and that only \$140 thereof had been paid, leaving due \$210 50.

The answer set up that defendant had bought goods to the amount of \$131 only, and had paid on account \$140, being an overpayment of \$9, for which he asked judgment.

The case was referred, and the evidence appeared as stated in the opinion. At the close of the trial, the referee allowed the defendant to put in an amended answer, setting up that on August 22d, 1868, the plaintiff and defendant had an accounting and settlement of their business transactions, when the sum of \$9 was found due the plaintiff from the defendant, which sum the plaintiff then agreed to take in full satisfaction for all his demands.

That on August 22d, 1868, the plaintiff sold and delivered to the defendant goods amounting to the sum of \$169, which was the last goods thus sold and delivered by the plaintiff to the defendant.

That afterwards defendant paid to plaintiff, on account thereof, \$190, and that plaintiff was thereby overpaid, by a mistake of defendant, the sum of \$12. Demand of judgment accordingly.

The referee found as matters of fact:

I. That in the early part of the year 1868, the plaintiff and defendant had business transactions together, which were settled on August 22d, 1868, at which time there remained due to the plaintiff the sum of \$9.

II. That after the said settlement, and on August 22d, 1868, the defendant bought of the plaintiff goods amounting in value

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to \$199; that \$160 was paid to the son of the plaintiff; and that the further sum of \$90 was paid to the plaintiff in person.

III. That there was due from the plaintiff to the defendant \$12, that amount having been overpaid by him to the plaintiff.

He gave judgment accordingly, which was affirmed by the general term of the Marine Court, and plaintiff appealed to this court.

J. H. & B. T. Watson, for appellant.

David Levy, for respondent.

BY THE COURT.*—DALY, CH. J.—The defendant testified that on the 22d of August, 1868, the plaintiff went over his account of goods sold to him, the defendant, and of moneys paid by the defendant, and that the *result was* that \$9 was coming to the plaintiff. The referee has found that this was a settlement or agreement between the parties of the amount then due, or, in other words, an account stated. It is suggested upon this appeal, that it does not appear from this evidence that the defendant participated or took any part in what then occurred; but I think the fair inference is, that the defendant was testifying to what occurred in his presence. The referee so understood the evidence, and I think he was right in so interpreting it. There is nothing in this testimony to show that the defendant was testifying to what was communicated to him by somebody else; and that the plaintiff also understood him as referring to what occurred in his presence, and in which he took part, may fairly be inferred by the plaintiff's omitting to ask the defendant, who was present; or in showing by his own evidence, for he was examined as a witness, that this accounting was with another person than the defendant. He did not contradict the defendant's statement that this accounting was had on the day stated; and if it was with another than the defendant, it was an easy matter for the plaintiff to show it.

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It is not necessary in an account stated that there should be mutual or cross demands. They may be all on one side, or consist, as in this case, of charges and the acknowledgment of payment. The simple reading over of the items of an account between the parties, and the striking of a balance, or the agreement upon the amount due, is sufficient (*Jacob v. Lindsay*, 1 East, 460; *Styart v. Rowland*, 1 Show. R. 215; *Highmore v. Primrose*, 5 M. & Selw. 65; *Knowles v. Michel*, 13 East, 249). The account of the goods sold and the payments was gone over in this case, and the result arrived at was, the defendant says, that there was \$9 due to the plaintiff, showing that the defendant acquiesced and agreed in that as the amount due. Upon this state of facts an action could have been maintained against the defendant for the \$9, as upon an account stated (*Hutchinson v. The Market Bank of Troy*, 48 Barb. 302; *Longdon v. Roane*, 6 Ala. R. 518; *Phillips v. Belden*, 2 Edw. Ch. 1; *Murray v. Toland*, 3 John. Ch. 569; *Wilds v. Jenkins*, 4 Paige, 481).

When an account is thus stated, it is usually conclusive upon both parties, but not absolutely so, unless there has been mutual compromises, which operate as an estoppel *in pais*; but otherwise it is open to impeachment for fraud or mistake, but the affirmation or burden of showing fraud or a mistake is upon the party impeaching it (*Lockwood v. Thorne*, 11 N. Y. Rep. 170; *Id.*, 18 N. Y. Rep. 292). When the parties have adjusted an account, have struck a balance, and agreed upon the amount due, courts are exceedingly unwilling to open it again, unless there has been fraud, or it is very clear that there has been a mistake. "No practice," said Chief Justice MARSHALL, in *Chappedelaine v. Dechenaux* (4 Cranch, 306), "could be more dangerous than that of opening accounts which the parties have themselves adjusted, on suggestions supported by doubtful, or by only probable testimony."

In the present case, the plaintiff did not deny that the account of goods sold and payments made had been gone over at the time stated, and that the result arrived at was a balance due the plaintiff at the time of \$9. He gave no testimony to show how this result was arrived at, or by what mistake in respect to

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any particular item or items the error was made. On the contrary, before there was any evidence of the statement of this account, the plaintiff gave evidence of all the goods he had sold and the payments made to him; the testimony of himself and his son being somewhat loose as to dates, and making in all \$488 50, against which, he admitted payments to the amount of \$140, and then, by what process I am unable to discover, made the balance due, \$210 50, which, according to the figures, should be \$348 50; and again, he produced a statement from his books, Ex. C., commencing with \$9 as the balance of an old account of the date of May 28, 1868, making all together, \$359 50, against which he allowed four credits for payments, to the amount of \$140, making a balance of \$219 50; so that his account, Exhibit C. and his oral statement do not agree. Again, the plaintiff's Exhibit B. shows the balance of old account in May, 1868, to be not \$9 but \$11, and it may be added, with respect to this balance, that he testified upon his cross-examination that he could not tell all the money the defendant paid during his business transactions with him in 1867. His own version, therefore, of the state of the accounts, before, as I have said, any evidence was given of the stating of an account upon August 22d, 1868, was confused, contradictory and uncertain.

The defendant testified that there was, as appears in plaintiff's Exhibit C., a balance of account in the plaintiff's favor of \$9; but not as stated in the exhibit of the date of May 28th, 1868; but as the result of going over the account of sales and payments, August 22d, 1868. As the fact that an accounting was had at this date, August 22d, 1868, was not denied by the plaintiff, the referee, very properly, as I think, took the balance then found to be due, \$9, as the true state of indebtedness, as an account stated and adjusted between the parties. There was no conflict as to the goods delivered to the defendant after that date. The plaintiff's oral testimony, his two exhibits, B. and C., and the testimony of the defendant, alike agree in respect to the items and the amount, which was \$169, making with the \$9, \$178. The conflict was in respect to payments. The plaintiff swore that the whole amount paid to him by the

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defendant was \$140, \$40 to himself and \$100 to his son ; whilst the defendant swore that he had paid, in different sums, to the son and to the father, \$190, being an overpayment of \$12, which the referee reported as due to the defendant. Upon this point, the amount paid, the testimony being conflicting, the decision or conclusion of the referee is final, and cannot be reviewed.

The complaint admitted the payment by the defendant of \$140, and the answer averred that the goods sold to him by the plaintiff did not amount to more than \$131, and that this was paid and overpaid by the \$140, to the amount of \$9. Under this answer, the defense set up by the defendant was not receivable, and resting as it did solely upon oral testimony, was certainly suspicious after such an answer. But the testimony was allowed to be given upon the trial without objection ; in which case, as a general rule, the court will conform the pleadings to the proof, in furtherance of justice ; and as we possess this power upon appeal, it becomes unimportant to determine whether the referee had any authority or not to allow, as he did, the answer to be amended after the evidence was in. The material part of the defense was the stating of the account, and as that was not controverted by the plaintiff upon the trial, one ground for the suspicion of a fabricated defense was removed. The only remaining one was in respect to the payments ; but as the referee, before whom both the plaintiff and the defendant were examined as witnesses, was satisfied on the point, we should not hesitate to conform the pleadings to the testimony when the evidence was received without objection. Judgment should be affirmed.

Judgment affirmed.

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C. BAINBRIDGE SMITH v. WILLIAM HEATH AND ANOTHER.

A stockbroker agreed with his customer to carry certain stock for him on the latter's agreement to repay whatever rate of interest the broker might be obliged to pay to obtain the money for that purpose. The broker was obliged to pay a usurious rate of interest for the money, and charged the same to the customer. *Held*, that as between the broker and his customer, this did not amount to an exaction of usury, so as to avoid the transaction between them. In such a case, the broker acts merely as the agent of his customer, and not as a principal.

A promissory note was given in payment, in part, of a valid loan of money, and, in part, of an amount of usurious interest, exacted under another agreement disconnected with the loan. *Held*, that the valid loan, constituting part of the consideration of the note, not being affected by any suspicion of usury, was not discharged, and that the only relief to which the maker was entitled against the note was an abatement of so much of the amount thereof as was made up of the usurious interest.

Held, therefore, that to entitle the maker to an injunction against the prosecution of the note, in an action brought for that purpose, he must offer to pay so much of the note as constitutes the original valid indebtedness. Asking equity, the plaintiff should do equity.

APPEAL from an order denying a motion for a preliminary injunction.

This action was brought by the plaintiff against the defendants, who were stockbrokers, doing business under the name of William Heath & Co., to prevent them from prosecuting an action against him in the State of Vermont, and from selling plaintiff's property in that State.

A motion for a preliminary injunction, made at special term, was denied, and the following opinion rendered, in which the facts are stated.

ROBINSON, J.—The pleadings and affidavits disclose these facts: that the defendants are stockbrokers, in the city of New York, under the name of Wm. Heath & Co., and on May 25th, 1869, on request of plaintiff, they received from Brown & Co. 600 shares Mariposa stock, at \$45 per share, amounting, in the

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aggregate, to \$27,000, which they paid for, agreeing, upon a deposit by him of \$8,000 margin, to carry the same for sale on his account. The difference of \$19,000 they allege they borrowed on his account. This transaction appears to have been merely one between *principal and broker*, and there seems to be no reason for imputing to it any other character. The defendants continued to carry this stock for him until June 4th, 1869, when they sold 300 shares, and on 29th December, they sold the other 300 shares, and, on settlement of accounts between the parties, on that day, a balance of \$5,463²⁸/₁₀₀ was found due defendants, for which the note (the prosecution of which is sought to be enjoined) was given. No extra interest beyond seven per cent. is pretended to have been claimed or exacted by defendants, until June 30th, 1869, when, on notice, they claimed extra interest, as "being the rate paid by us (defendants) for money." And from that time until the settlement, in December 29th, 1869, they, from time to time, and with plaintiff's concurrence, charged him on account, sums for extra interest, claimed to have been paid by them for procuring the loan of money to enable them to carry his stock. These claims he acceded to, and their total amount is \$437¹²/₁₀₀.

The original transaction involved the advance by defendants of \$27,000 for account and benefit of the plaintiff, and no intimation or agreement for extra interest was suggested till a month after it was made.

There can be no doubt that each party to the original transaction had a right to put an end to it, on reasonable notice to the other; that it was not one for the mere loan or forbearance of money, or to conceal such a transaction under the form of brokerage; and that the defendants being mere agents, burdened with personal obligations which had been assumed by them for or on behalf of their principal, had a right to claim, as a condition for the continuance of their relations, not only that such exactions or liabilities as they were compelled to pay or assume for further indulgence in his business should be adopted by him, but could also exact such compensation, even under the name or in form of additional interest, for their care and responsibility in executing his business, as they chose to demand, and

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if such claim was acceded to, as by the giving of a note therefor, it became perfect as a legal obligation.

In the present case, it is manifest the original loan or advance was unaffected by any suspicion of usury, and the subsequent exaction of extra interest, in the course of the dealings between the parties for the further carrying of stock, even if it had been usurious, did not discharge the original debt, or entitle the plaintiff to any relief, except to an abatement of \$437¹²/₁₀₀ (the amount claimed to constitute such usurious interest) from the amount of the note given on final settlement (*Winsted Bank v. Webb*, 39 N. Y. 325; *Farmers and Mechanics' Bank v. Joslyn*, 37 N. Y. 353; *Carson v. Ingalls*, 33 Barb. 657).

In my opinion, no usury can be predicated upon the transaction, but were this otherwise as to the extra interest, the right to the recovery of amount due upon the original loan, excluding this alleged usurious interest, is clear.

Plaintiff claims an injunction against the prosecution of the note in the State of Vermont, without any offer to pay what is justly due on the original indebtedness. Asking the interference of a court of equity, he should have offered to do equity (*Campbell v. Morrison*, 7 Paige, 157; *Fanning v. Dunham*, 5 John. Ch. 122).

For these reasons the injunction is denied, with \$10 costs.

From the order denying the motion for a preliminary injunction, the plaintiff appealed to the court at general term.

C. Bainbridge Smith, appellant, in person.

Augustus F. Smith, for respondents.

BY THE COURT.*—LARBREMORE, J.—The judge, in his decision of the motion from which this appeal is taken, has characterized the transaction between the parties as “merely one between principal and broker.” Such a conclusion is justified by the papers read on the motion. The moneys advanced by defendants to carry the stock in question, were borrowed by them at the request and for the use of the plaintiff, and the ex-

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tra rate of interest charged and paid therefor, in no way inured to the benefit of the defendants. They discharged (by plaintiff's direction) obligations which he had assumed or incurred, and were entitled to payment of the amount thus disbursed. All the transactions in reference to the charge and payment of such extra interest were had and conducted, not as between the plaintiff and defendants, but between third parties and the defendants as agents of the plaintiff. He agreed to pay such extra interest, and may be said to have borrowed from the defendants the amount necessary for that purpose. I cannot find in such a proceeding any violation of the statute against usury. But if this view be incorrect, the holder of the note is entitled to recover the amount of the original indebtedness for which it was given, exclusive of the amount alleged to be usurious (*Farmers and Mechanics' Bank v. Joslyn*, 37 N. Y. Rep. 353; *The Winsted Bank v. Webb*, 39 N. Y. Rep. 325; *Carson et al. v. Ingalls*, 33 Barb. 657).

The order denying the injunction was properly made, and should be affirmed.

Order affirmed.

GURDON BUCK v. FRANCIS H. AMIDON.

It is a general principle of the law of agency, that one who procures services to be done for another is not himself chargeable as the debtor, unless he omits to make known his principal, or erroneously supposes that he has authority, or exceeds his authority, or expressly or impliedly engages to be answerable, either by distinctly promising to pay for them if rendered, or by doing or saying something which justifies the person who is to perform them, in supposing that that the one who applies to him engages to pay therefor.

Upon the question as to whom the plaintiff gives credit, where one person orders him to do work for another, the circumstance as to whom the plaintiff charges the work on his books, and to whom he makes out his bill, is most material, and unexplained, is controlling.

Where, upon an uncontradicted state of facts, the point involved remains doubtful or upon undisputed facts, inferences may be drawn either way, the question is properly one for the jury, and their finding should be conclusive. But in all

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such cases, there must be something in the evidence on which to found the conclusion, and whether there is or not is a question of law.

APPEAL by defendant from a judgment of the general term of the Marine Court, affirming a judgment entered on the verdict of a jury at trial term.

The action was brought to recover the value of services rendered by the plaintiff as a physician and surgeon, bestowed upon J. C. Amidon, the defendant's brother, at the special instance and request of the defendant. The facts are stated in the opinion.

The jury rendered a verdict for the plaintiff, on which judgment was entered.

The defendant appealed to this court.

Ira D. Warren, for appellant.

I. There being no conflict of evidence, the defendant's liability is a question of law (*Pratt v. Foot*, 9 N. Y. 465).

II. The facts show that no credit was given to the defendant, and that he acted as a mere agent (2 Kent's Com. 630; 1 American Leading Cases, 614; Smith's Mercantile Law, 144, sec. 7; *Owen v. Gooch*, 2 Esp. 567; Dunlap's Paley on Agency, 369, 370, cases cited in note (*d.*); Story on Agency, § 261, § 289, note; *Costigan v. Newland*, 12 Barb. 458; *Stanton v. Camp*, 4 Id. 278; *Dana v. Monro*, 38 Id. 528; *Colvin v. Holbrook*, 2 N. Y. 126).

Matthews & Betts, for respondent.

I. The question in this case being as to the intention of the parties as deduced from the facts and circumstances of the case, was properly submitted to the jury, and their verdict will not be disturbed (*Dannell v. Pratt*, 2 Carr. & P. 82; *Leggatt v. Reed*, 1 Id. 15; *Hayward v. Fiott*, 8 Id. 59; *McCaffil v. Radcliffe*, 3 Robt. 445; *Cross v. Williams*, 7 Hurl. & N. Ex. 673; *Williamson v. Barton*, Id. 899; *Miller v. Eagle Life and Health Ins. Co.* 2 E. D. Smith, 287; *Taylor v. Allen*, 36 Barb. 294;

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Fero v. Buffalo & S. L. R. R. Co. 22 N. Y. 209; *Tuttle v. Buck*, 41 Barb. 417; *McClune v. Cain*, 3 Abb. Ct. App. Dec.; 2 Keyes, 203; *McCaffil v. Radcliffe*, 3 Robt. 435).

II. A party who would excuse himself from responsibility on the ground that he acted as an agent of another ought to show that he had done sufficient to charge his principal (*Sewall v. Fitch*, 8 Cow. 215; *Mauri v. Heffernan*, 13 Johns. 57). In the case of an agent acting for a foreign principal, as in this case, the strong presumption is that the credit is given exclusively to the agent (Story on Agency, § 270).

BY THE COURT.*—DALY, CH. J.—There is no conflict in respect to the facts in this case. There may be some little variation or difference between Dr. Buck and the defendant's account of what occurred between them, but nothing that could materially affect the case. It is only that difference ordinarily found between two persons in narrating the same transaction, but not any difference as to the facts, which, as narrated by both, are substantially the same.

The defendant's brother, J. C. Amidon, who was a resident of Groton, in Connecticut, had an affection of the bladder, for which he was attended by a Dr. Francis, of New London, and whilst the doctor was engaged in drawing the patient's water by means of a catheter, the cap or button of the instrument broke off and the catheter passed into the bladder—a very unusual circumstance—and which involved the necessity of a very delicate and skilful operation to extract the catheter. The family was alarmed at the accident, and requested the doctor to send to New York for a surgeon, by telegraph, and “to make the thing sure,” to send the dispatch to the patient's brother, F. H. Amidon, the defendant, as “he would be sure to deliver it.” Dr. Francis accordingly sent a dispatch to the defendant in these words: “New London, Nov. 20, 1869, 2 p. m. To Francis Amidon, 649 Broadway, N. Y. Don't fail to come and bring a surgeon to-night. GURDON BUCK, M. D., 121 Tenth street. Please come immediately. Elastic catheter

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lost in the bladder of patient, possibly also stone. If you cannot come, please direct to the most suitable surgeon. Dr. Francis. Please answer, but don't fail to come with a surgeon." It was a dispatch alike to the defendant and to Dr. Buck, or, as Dr. Francis testified, he sent two dispatches, which were probably united in one.

Immediately upon receiving the dispatch, the defendant went to the residence of Dr. Buck, the plaintiff, who is an eminent surgeon in this city, and told him that he had received a telegram from his brother's physician, requesting him to bring up a surgeon that night to relieve his brother, living opposite New London (Groton), who had got a catheter in his bladder, and taking out the dispatch he read it to the plaintiff. He asked the plaintiff if he knew Dr. Francis, his brother's physician, and the other said, "No, but that he may have met him;" upon which the defendant replied that he must have heard of some operation of his, from his inviting the defendant to call upon him; to which the plaintiff answered that he was somewhat known as a surgeon. The defendant then said, "The question is, can you go;" and the plaintiff, after some hesitation, said, "Yes." The defendant then advised him that there was a train that evening at 8 P. M.; that if he could go, the defendant would go with him, and it was arranged that they should meet at the depot. The defendant then went away, and apprehending that there might be some misunderstanding, returned and left the telegram with the plaintiff, in order, as he said, that he might understand Dr. Francis better than he did, and they exchanged a few words confirming the appointment for the evening train at 8 o'clock. Nothing was said about who was to pay the plaintiff. The defendant testified that he did not consider that he had any discretion in the matter, and the plaintiff testified that when the dispatch was left with him, he took it to the light in his office, and seeing that it was addressed to F. H. Amidon, he referred to the directory, and finding, he said, that the person who called upon him was Mr. Amidon, the hatter, he took it for granted that he was dealing with a responsible party.

The plaintiff and the defendant met, pursuant to the appoint-

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ment, in the evening, at the depot and went up together to Groton, the defendant paying Dr. Buck's fare. Upon the doctor's arrival at three o'clock in the morning, he examined the patient, and during the day the operation, which is elaborately detailed in the evidence, was successfully and very skilfully performed by him, to the great relief of the patient and to the satisfaction of the attending physician, and of all parties.

The plaintiff testified that he noticed that the patient was living upon a moderate scale, and that he was taken by surprise to be sent for so far by a man living apparently upon a moderate scale; that he considered that people in straitened circumstances do not send to distant cities for eminent medical service unless they are able to pay for it, or unless they have friends who can, and that he took into consideration that New England people should not be taken by their appearance, and knew that the patient had kind friends who could be responsible for extra medical services.

Upon the evening of the day of the operation, and shortly before the departure of the plaintiff, the defendant's brother sent for him and requested him to ask the doctor for his bill, which the defendant accordingly did. The plaintiff replied that it did not matter about presenting a bill then, and gave the defendant a piece of paper, with these words written upon it, "Dr. Buck, 46 West 29th street, \$400." The defendant then went into his brother's room, told him what the doctor's bill was, and he expressed great surprise. The defendant returned and told the doctor that his brother thought that it was a very large bill, and that he must remember that his brother was not a rich man, and the doctor answered that he supposed the people who could send for a surgeon that distance were rich, or, as the plaintiff testified, he replied that he had taken that into consideration; that he was not accustomed to go away and render services except upon such terms; that he had rendered a very important service, and saved the patient from a very serious operation which would have been necessary, if the plaintiff had not succeeded as he did; which was the first occasion upon which anything had passed between the defendant and the doctor upon the subject of his remuneration.

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The doctor then left, and eight days afterward, he sent a bill to the defendant, in which the patient was named as the debtor. It was in these words, "New York, Nov. 29, 1869. Mr. J. C. Amidon, Groton, Conn., to Dr. Gurdon Buck, *Dr.*, No. 46 West 29th street. To professional services, surgical operation, at Groton, Conn., &c., &c. \$400;" which the plaintiff says he sent to the defendant, as he supposed that the brother in New York was the proper *channel* to send the bill to; and, on the 4th of December following, the plaintiff sent to the patient the following letter: "Mr. J. C. Amidon, Groton, Conn. Dear Sir: After waiting a reasonable time without hearing *from you*, I beg leave to remind you that it is customary to settle such accounts as mine, for professional services rendered at a distance, promptly. Hoping it will receive your early attention, I remain, &c., &c."

This letter was followed by letters between the plaintiff and Dr. Francis, of New London, and by a letter from the patient, and a note from the defendant, as indicated in the following letter which the plaintiff addressed to the patient on the 14th of December, 1869: "Mr. J. C. Amidon. Dear Sir: I beg to acknowledge your favor of the 9th instant, and to inform you that your brother addressed me a note yesterday, offering me one hundred and fifty dollars in settlement of my bill for professional services. I wrote Dr. Francis in reply to a letter received from him last week, and in consideration of explanations made by him, I expressed my willingness to make a concession of \$100 in settlement of my bill. I desired him to communicate the contents of my letter to you, and supposing him to have done so, I received *your* last proposal with no little surprise. I am not disposed to conform my terms to *your* ideas of liberal remuneration, and have not been accustomed, after rendering important services, especially at a distance, to submit to conditions the design of which seems to be, to determine how little may be got off with. I shall still adhere to my terms of \$300, and hope there may be no further delay in settling. Very respectfully, &c., &c."

The plaintiff testified that \$500 would have been his charge but for the circumstances in which he found the defendant's

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brother living, and two eminent surgeons, Drs. Parker and Van Buren, testified that \$500 would have been a reasonable charge. Upon this state of facts, the judge left it to the jury to determine who employed the plaintiff, or upon whose account and credit the services were rendered, and the jury found a verdict for the plaintiff for \$400.

It is suggested, in answer to the defendant's appeal, that the question to whom the credit was given, was one of the intention of the parties as deduced from the facts and circumstances, and that the jury, having drawn the deduction that the services were rendered upon the credit of the defendant, their verdict should not be disturbed. Where, upon an uncontradicted state of facts, the point involved remains doubtful, or upon undisputed facts, inferences may be drawn either way, the question is properly one for the jury, and their finding should be conclusive. In all such cases the unanimous concurrence of the twelve minds in the jury box, is as satisfactory a mode of reaching a right conclusion, as to attempt to work it out by legal deductions or logical reasoning. But in all such cases there must be something in the evidence to found the conclusion upon, and in this case I fail to discover anything showing, or tending to show, that the defendant ever did or said anything to warrant the plaintiff in assuming, before he went to Groton, and before he performed the operation, that the defendant was to pay him for his services. It would be preposterous to say that a person who brings a message to a surgeon from the attending physician of a patient, requesting him to come and perform an operation upon the patient, is, by the mere delivery of such a message, chargeable with the obligation of paying the surgeon for his services. He is a mere agent, and nothing more, unless he communicates the message in such a way, or does, or says something that fairly warrants the surgeon, before he undertakes the service, in supposing that he is the person who is to pay for it, and in this respect it can make no difference that the bearer of the message happens to be a brother of the patient.

It is a general principle pervading the law of agency, that one who procures services to be done for another is not himself

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chargeable as the debtor, unless he omits to make known his principal, or erroneously supposes that he has authority, or exceeds his authority, or expressly or impliedly engages to be answerable, either by directly promising to pay for them if rendered; or, by doing or saying something which justifies the person who is to perform them in supposing that the one who applies to him engages to pay for them. The law is too well settled in this respect to make it necessary to refer to authorities, and the direct application of it to the facts now before us may be illustrated by the case to which the appellant has called our attention (*Owen v. Gooch*, 2 Esp. 567). The plaintiff, in that case, was a paper hanger, and the defendant gave him an order for paper and work to be done in the way of his business in the house of one Tippel, the plaintiff being informed, when the order was given, that the work was on Tippel's account, and the entry upon the plaintiff's book being "Mr. Tippel, by order of Gooch." It was argued in that case, as it is in this, that the person for whom the work was done may have been unknown to the plaintiff; but the defendant Gooch was known to him, and that, under such circumstances, the work must be deemed to have been ordered on his credit, and that he was consequently liable. The answer of Lord Kenyon may be quoted as pertinent, in its general bearing to the present case. He said, "If the mere act of ordering goods was to make the party who ordered them liable, no man could give an order for a friend in the country, who might request him to do it, without risk to himself. If a party orders goods from a tradesman, though, in fact, they are for another, if the tradesman is not informed at the time that they were for the use of another, he who ordered them is certainly liable, for the tradesman must be presumed to have looked to his credit only. * * * But, wherever an order is given by one person for another, and he informs the tradesman who the person is for whose use the goods are ordered, he thereby declares himself to be merely an agent, and there is no foundation for holding him to be liable."

In the present case, the defendant exhibited to and left with the plaintiff the dispatch he had received, and the plaintiff admitted, upon the trial, that the defendant told him that the

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patient therein referred to was his brother. He was, therefore, informed beforehand of the person upon whom the operation was to be performed, and the argument of the plaintiff's counsel, upon the appeal, that the plaintiff "knew nothing about the defendant's brother, not even his name, made no inquiries about him or his responsibility, and hence could not have contracted for his services upon his credit," is sufficiently answered by the remarks above quoted from Lord Kenyon. This is all the defendant did, except to pay the plaintiff's fare to New London; but this was after the doctor had come to the railroad prepared to go Groton and perform the operation, and was in itself too slight a circumstance upon which to found an implied engagement to pay the plaintiff for his services.

But the case is not only destitute of any act upon the part of the defendant which would justify the plaintiff in assuming, when he consented to go, that the defendant was to pay him; but his own acts, then and subsequently, show that it was the patient, and not the defendant, that he looked to for the payment of his bill. Before leaving, he consulted the directory, and found that the person who called upon him was Mr. Amidon, the latter, when, he says, he took it for granted that he was dealing with a responsible party; but that the one whom he took it for granted was a responsible party, was the patient upon whom he was to perform the operation, is shown by his own statement, upon the trial, that when he reached Groton he "was taken rather by surprise to have been sent for so far by a man living upon a moderate scale," but took into consideration that "New England people should not be taken by their appearance," a presumption in the application of which he may still be right, for there is nothing in the case to show that the defendant's brother was not a responsible person, and able to pay the amount which the plaintiff claimed. All that the case shows is that he complained that it was too large, and that he offered through his brother to pay a smaller sum.

All the plaintiff's subsequent acts, like the preceding, show that it was to the person upon whom the operation was performed, that he looked for the payment of his bill. He made it out to him and sent it to the brother here in New York, because, to use his own words, he supposed that he was "the proper

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channel to send it to." That he considered the defendant simply as a "channel" through which to send the bill to the debtor, is shown by the fact that after eight days had elapsed, without its being paid, he sent a letter, not to the defendant, but to the patient, and advised him that he had waited a reasonable time without hearing *from him*, and in the next letter, of December 14th, he writes to the patient: "I received *your* last proposal (the \$150) with no little surprise. I am not disposed to conform my terms to *your ideas*," and ends by hoping that there may be no further delay in settling. All this conclusively shows to whom the credit was given, and by whom, from the beginning, he supposed he was to be paid.

In the question which arises so frequently under the statute of frauds, to whom was the credit given, in cases where the point is whether the promise was collateral to answer in default of another or was an original undertaking, just weight is attached to the fact that the plaintiff has charged the defendant upon his books or made out the bill to the person who received the goods, to show that the promise of the defendant was simply a collateral, and therefore void for not being in writing (*Anderson v. Hayman*, 1 H. Black. 121; *Dixon v. Frazee*, 1 E. D. Smith, 34; *Larson v. Wyman*, 14 Wend. 246; Browne on Statute of Frauds, § 198). It is not absolutely conclusive, as it may be shown that it was done by mistake (*Loomis v. Smith*, 17 Conn. 115); but it is a most material, and, without explanation, a controlling circumstance; for, as my former colleague, Judge Woodruff remarked, in *Dixon v. Frazee* (*supra*), the plaintiff thereby puts his own construction upon the agreement. Such was the case here. The plaintiff made out his bill against the defendant's brother, and nothing appearing to show that this was done by mistake or any explanation given why he did so, the same construction would be given to so material a circumstance as was given in the cases above quoted; so that even if the defendant had promised to pay the plaintiff, the undertaking would be collateral, and void under the statute, not being in writing. After going carefully over the evidence, I can find nothing in it to support the verdict, and, in my judgment, it should be set aside.

Judgment reversed.

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SAMUEL B. HEARD AND OTHERS v. MARQUIS G. BREWER AND OTHERS.

The general rule is that the right of lien, which is in the nature of a pledge, attaches only to property which has come into the *actual* possession of the bailee, factor or other person who claims the benefit of it. But a merely constructive possession may, in some cases, give a lien, although the actual possession is in another.

Thus, where the plaintiff, a commission merchant, accepted a draft drawn on him upon advices from the drawer that he would make a shipment of goods to him to cover the amount, and the drawer shipped goods, with the clear intention on his part of appropriating them to the plaintiff for his security, *Held*, that the property in the goods passed to the plaintiff upon their shipment, and from that time the plaintiff was in constructive possession, and on their arrival was entitled to the actual possession as against an attaching creditor of the shipper.

In the absence of a bill of lading, the intention to vest the property in the goods in the consignee upon the shipment, so as to give him a constructive possession, subject only to the equitable right of stoppage in *transitu*, may be inferred from other documents, such as receipts or orders, or by the correspondence which has taken place between the parties.

A factor having a lien upon goods for the amount of his advances, can, in an action against a creditor of his principal, who has taken the goods under attachment, recover only the value of his special property in the goods. He is not entitled to a judgment for the whole value of the goods.

APPEAL by defendants from a judgment of the First District Court. The facts are stated in the opinion.

Brown & Estes, for appellants.

Cheney & Dixon, for respondents.

BY THE COURT.*—DALY, CH. J.—The plaintiffs disclaimed upon the trial any title to the goods as owners or purchasers, but put their right to recover upon the ground that they were the consignees, and had a lien upon the property by the accept-

* Present, DALY, CH. J., LARREMORE and J. F. DALY, JJ.

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ance of a draft, drawn upon them by the consignors, prior to the shipment of the goods, and which draft they subsequently paid. The sole question, therefore, presented upon this appeal is, whether they had such a lien when the property was attached in the suit brought against the consignor by the defendants Brewer & Kline.

The general rule is, that the right of lien, which is in the nature of a pledge, attaches only to property which has come into the *actual* possession of the bailee, factor or other person, who claims the benefit of it; but this, like all general rules, is subject to qualifications, for a right of lien may attach to a thing which is incapable of possession, or where the possession is simply constructive, the actual possession being in another. Of the latter class is the lien which a consignee or factor has upon goods for advances made, or agreed to be made, upon them, and which attaches the moment they are shipped, or consigned to him, subject only to the right of a stoppage *in transitu*, in the event of his insolvency before they come into his possession; of which the early case of *Krubach v. Craig* (3 Term R. 119; Id. 783), is a conspicuous example. The mere circumstance that a consignor ships goods to a factor for sale, and is in the habit of drawing upon the factor against the proceeds, does not of itself give the factor any right to anticipate the possession, or to keep it against the unpaid consignor (*Patten v. Thompson*, 5 M. & S. 356), but it is otherwise if bills are accepted upon the credit of a particular consignment, for then there is a specific pledge of the property, and a transfer of it to the factor takes place by the delivery or indorsement to him of the bill of lading, so that it is constructively in his possession, and he has a lien upon it for his indemnity, the moment it is shipped or consigned to him (*Anderson v. Clarke*, 2 Bing. 20; *Haille v. Smith*, 1 Bos. & Pul. 563; *Walley v. Montgomery*, 3 East, 585; *Feise v. Wray*, Id. 93; *Edwards v. Brewer*, 2 Mees. & W. 375; Abbot on Shipping, 333, 8th ed.). In the absence of a bill of lading, the intention to vest the property in the goods in the consignee upon the shipment, so as to give him the constructive possession, subject only to the equitable right of stoppage *in transitu*, may be inferred from

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other documents, such as receipts or orders, or by the correspondence which has taken place between the parties (*Bryant v. Nix*, 4 Mees. & W. 791). The question generally is, whether there was an appropriation or pledge of the specific property to the factor at the time of shipment, in consideration of the advances made or agreed to be made; for though a factor may make advances or accept bills upon advices from his principal that he has and will consign to him a cargo to cover the liabilities the factor has assumed, and the principal, instead of doing so, sends the bill of lading to another person as consignee, who delivers it to the factor to act for him in the business, by means of which the factor gets possession of the cargo, the latter has no lien upon it for the liabilities he has incurred, but holds it as the agent of the consignee from whom he received the bill of lading (*Bruce v. Wait*, 3 Mees. & W. 15). I refer to this particular case to show that it is the intention of the consignor at the time of shipment which governs, and this usually appears by his sending the bill of lading to the consignee who has incurred or agreed to assume liabilities in respect to the particular shipment, and when he has done this, the possession of the goods passes constructively to the consignee, and his lien attaches, even in a case where the ship in which they were was prevented from sailing by an embargo, and while thus detained, the consignor became bankrupt, and the goods were delivered into the possession of his assignees (*Haille v. Smith*, 1 Bos. & Pul. 563); and, as I have said, the transmission of other documents or the correspondence of the parties may show that there was a change of property *instantly* when the goods were shipped.

The law, as thus stated, is well settled, and we now come to the application of it to the facts of the case.


The plaintiffs are commission merchants in this city, and previous to the particular shipment out of which the controversy in this case arose, one Serverson, in Norfolk, Va., had shipped produce to the plaintiffs, and was in the habit of drawing upon them, and had done so several times. On the 12th of July, 1870, he drew a draft upon the plaintiffs for \$250 which, as appears from his letter, he did with the consent of the

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brother of one of the plaintiffs, who was in Norfolk. On the 14th of July, 1870, the draft was received by the plaintiffs, and they accepted it under the expectation of Serverson's shipping goods to cover it, and paid it on the 24th of July. On the 13th of July, the day after the draft was sent, Serverson wrote to the plaintiffs, advising them that he had that day shipped to them 45 packages of produce, and that he had on the day previous drawn the draft upon them for the \$250; adding that he would try and buy "stuff" for them every steamer. On the following day, the 14th, he wrote to acknowledge the receipt of their account and their check for an amount of sales made, which he inclosed back to them, saying that, as he had advised them on the previous day, he had drawn upon them, and in the close of the letter, he requested them to protect the draft, and that he would ship on Saturday, which was the 16th.

On Saturday, the 16th, the goods were shipped, a part of which were taken by the defendants upon the attachment. It does not appear that they were accompanied by any bill of lading. They were sent by steamer from Norfolk, and marked S. 14; the S. indicating Serverson and the figure 14 the number of the bin upon the steamer's wharf here, where goods consigned to the plaintiff were placed when they were put off the boat. The shipment, however, was accompanied by a letter from Serverson, containing an invoice of items, and advising the plaintiffs that he had that day shipped to them the goods enumerated in the letter, and telling them that they would see that that shipment made four that had been sent to them, amounting at the least at Norfolk to \$296, which he says will more than cover the draft of \$250, and the letter closes by advising them that he will continue to make shipments to them as long as he can make a profit, and that he will try to arrange the matter in Norfolk with Mr. W. F. Heard, the brother before mentioned, and who had a house in Norfolk; the meaning of which I infer to be that he would not draw upon the plaintiffs except with the approbation of W. S. Heard, whose consent, it will be remembered, was obtained before Serverson drew upon the plaintiff for the \$250.

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The defendants Brewer and Kline commenced an action against Serverson for a debt due to them by him, and being a non-resident, they obtained an attachment against his property which was placed in the hands of the other defendant, Smith, a marshal, who seized under it a portion of the goods embraced in this shipment of the 16th of July; the most of which was taken from a bin on the dock "under the letter S. with a diamond," or as it may be figured , and the residue as the goods were being landed from the steamer; the whole of which were subsequently sold by Smith under the attachment. The plaintiffs brought this action against the plaintiff in the attachment and the marshal who made the seizure, and recovered the value of the property taken, \$82 87.

I think the conclusion upon this state of facts must be, that Serverson made this particular shipment, as well as the three that preceded it, with the intention that the property should pass at once to the plaintiffs for their security and indemnity in accepting his draft for \$250. He had obtained, as I have said, the consent of the brother of one of the plaintiffs, who had a house in Norfolk, to make the draft, and being drawn with his approbation, Serverson no doubt assumed that the draft would be, as it was, accepted by the plaintiffs. His letter to the plaintiffs shows that it was his intention to ship produce to them by every steamer, to cover the amount of this draft, and when he shipped sufficient for that purpose, he advised them that the four shipments, of which the one in controversy was the last, would more than cover, as they did, the amount of the draft. All of this shows, in my judgment, a specific appropriation of the property to the plaintiff, in each of the four shipments, for the liability to be assumed on their part by the acceptance of the draft. The draft was accepted on the 14th, and the last of the four shipments was made on the 16th; Serverson probably did not then know that the plaintiffs had accepted it, but it is evident from the fact that he assumed that they would, or had, as they did, accept it. It may be that one or more of the shipments were made before the draft was sent, but if they were, the check which the plaintiff sent to him was returned by Serverson, in consequence of his having sent the draft,

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showing the intention on his part to appropriate to the plaintiffs the whole of the goods in these four shipments, or a specific pledge of this particular property to the plaintiffs, to indemnify them for a liability to be assumed, and which they did assume and discharge by the payment of the draft.

It is not like the case of a principal who consigns goods to a factor for sale and draws against the proceeds, in which case the factor's lien is upon the proceeds or upon the goods in his possession for his security, if he has accepted or paid the draft. But it is the case of a draft upon a factor to be covered by goods to be sent, and which goods, the moment they are shipped, vest absolutely in the factor as his security or indemnity for the prior acceptance, and subsequent payment of, the draft. It is somewhat in this respect like the case of *Virtue v. Jewell* (4 Camp. 31), in which the consignor was indebted to the consignees on a balance of account and upon drafts of his which they had accepted; on account of which indebtedness he consigned them a quantity of barley. In that case it was held that the property in the barley vested absolutely in the consignees, having been consigned to them on account of the indebtedness, even though they failed to pay the acceptances. "The circumstance," said Lord Ellenborough, "that the consignee was indebted on a balance of accounts divested him of all control of the barley from the *moment of its shipment*." Though there is some difference in the facts, the principle which governs in both cases is the same. In the one, there was an indebtedness upon a balance of accounts. In the other, the plaintiffs accepted the draft with the expectation of the drawer's shipping goods to cover it. The goods in controversy were shipped by the drawer for that purpose. They were shipped upon the assumption that the draft would be accepted, and before they were sent, the draft had been accepted. The moment, therefore, that they were shipped, the property passed to the plaintiffs, and it was constructively in their possession and subject exclusively to their control when the marshal attached it as the property of Serverson.

The judgment should be affirmed.

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J. F. DALY, J.—I concur in the views of the Chief Justice, set forth in his learned opinion, so far as the right of the plaintiffs to recover under their lien for advances is concerned, but I regard the recovery of \$82 87 as excessive. The balance due the plaintiffs, as testified to by them, was \$64 19, and as this was the extent of their special property in the goods, it should be the extent of their recovery. In *Fitzhugh v. Wiman* (9 N. Y. 565), it was held, that in an action by the forwarder making advances and entitled to his freight, brought against another who takes the goods wrongfully from the plaintiff, but actually delivers them to the rightful consignee or owner before the suit was brought, the plaintiffs cannot recover the actual value of the goods, and the value to be assessed should be the value of their special property in the goods. It was said by Judge Johnson, that if the goods had not been so delivered by the defendant to the rightful owner or consignee, they would have been entitled to a judgment for the *whole* value. This, of course, is founded in reason: the forwarder had to deliver the goods or answer for his default to the extent of their whole value; if a wrongdoer take them from him, he is entitled to recover the whole value himself, in order to answer to his consignee; but if the wrongdoer himself deliver them to the consignee, the forwarder has only the right to the demand he would have against the latter.

In this case, the goods were seized by the marshal under an attachment against the principal, who was a non-resident, and was indebted to the parties obtaining the attachment upon a balance due on a draft. The value of the goods was \$82 87; the difference between that value and the plaintiffs' special property in the goods, under their lien, \$64 19; which difference amounted to \$18 68, certainly belonged to the plaintiffs' principal in Norfolk, and was subject to attachment for his debts. By the attachment it was applied to them.

The judgment should be modified, so as to make it a judgment for \$64 19. And no costs should be allowed to either party on this appeal.

The other judges concurred.

Judgment modified accordingly.

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STEPHEN N. SIMONSON v. SAMUEL KISSICK.

A writing in the following words, viz.: "This is to certify that I, A., sell to B., for the sum of \$17,000, the house (describing it), and that I have received \$75, the balance to be paid in thirty days," was signed by both A. and B., and was accepted by B., who paid to A. the \$75; *Held*, in an action against A. (the seller) by a broker, to recover his commission for effecting the alleged sale, that the signing of the instrument by B., and the payment of the \$75, was sufficient to show an agreement on his part to purchase the house at the price named, which a court of equity could specifically enforce; and that, accordingly, the broker was entitled to his commissions as for a sale effected.

APPEAL by defendant from a judgment of the general term of the Marine Court, affirming a judgment entered on the verdict of a jury at trial term, upon the direction of a judge.

The action was brought by the plaintiff to recover commissions as a broker on effecting a sale of land for defendant.

The following facts appeared on the trial:

The defendant employed the plaintiff, a broker, to procure a purchaser for the defendant's house, at a specified price; and the plaintiff made many efforts to sell it at the price fixed, but without effect. The defendant then reduced the price to \$17,000, and told the plaintiff that he might sign a contract for the sale of it, if he found a purchaser at that price. After this understanding, one Peter Gilmore came to the plaintiff, and asked him if he had the house for sale. The plaintiff replied that he had. Gilmore then said, I will give you \$17,000 for it; and the plaintiff replied, "that will buy it, the house will be yours," and he gave him the defendant's name. Gilmore afterwards saw the defendant, who wanted \$17,500. Gilmore offered \$17,000; whereupon an instrument in writing was drawn up, and signed by both parties, which was in these words, "This is to certify, that I, Samuel Kissick (the defendant), sell to Peter Gilmore, &c., for the sum of \$17,000, the house (describing it), and that I have received the sum of \$75, the balance amounting to \$16,925 to be paid in thirty days."

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It appeared that the house originally belonged to one William Gilmore, who sold it to the defendant, Kissick, and that Peter Gilmore, the purchaser, was induced to buy it, that he might thereby get \$1,000 which William Gilmore owed him. William Gilmore had told him that he would pay the \$1,000 when the house was sold; and Peter Gilmore intended to become himself the purchaser, that he might secure this debt, by deducting the \$1,000 from the purchase money. With this view he went to William Gilmore, who told him that the house had passed out of his hands, and that he had nothing more to do with it; and the defendant having put the property in the plaintiff's hands for sale, Peter Gilmore went to the plaintiff, as before stated, and the result of his communicating with him was the interview with the defendant, the payment to him of the \$75 upon the purchase by Peter Gilmore, and the execution of the instrument before described.

After the execution of the instrument, Peter Gilmore, the purchaser, told the defendant that he wished to have deducted from the purchase money the \$1,000 which William Gilmore owed him, and also \$1,000 which William Gilmore owed to a person named Orr; and the defendant answered that he would allow the \$2,000 to be deducted from the amount to be paid, if William Gilmore would allow it to him. This however, it would appear, the defendant afterwards refused to do. Mr. Martin, the defendant's attorney, proposed to draw a new contract; but Peter Gilmore, the purchaser, declared that he would keep the one he had, unless provision was made in the new contract for the deduction from the purchase money of the \$1,000 which William Gilmore owed him; and in this condition matters stood until the end of the thirty days named in the written instrument, when the defendant offered what he called a deed to Gilmore, which the latter refused to take, unless the two sums before referred to were deducted from the purchase money, to which the defendant would not consent; and Gilmore thereupon refused to take the property. Upon this state of facts the jury, under the instruction of the court, found a verdict in favor of the plaintiff for the amount of his commission.

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William R. Martin, for appellant.

I. The signature of the alleged purchaser to the paper did not impose any obligation upon him. He is not described in the paper as a party to it, and there are no words that bind him to anything, or by which he undertakes or agrees to anything (*Thomas v. Gumaer*, 7 Wend. 43; *Ackley v. Hoskins*, 14 Johns. 374).

The legal effect of the paper was, that the vendor was bound to sell for \$17,000 cash, for thirty days; that is, he gave the proposed purchaser an option. While the proposed purchaser held that paper, he might come, within the fixed period, and pay in cash the specified sum, and demand the deed; and for this option he paid the \$75.

II. On that paper alone, as an *express contract*, the vendor could not have compelled performance by the purchaser. The assent of the parties to an agreement must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions. This assent must be expressed, and it must be expressed to an agreement which is obligatory on the party (2 Parsons' Cont. p. 475-6; see *McCotter v. Mayor, &c.*, 37 N. Y. 325; *Myers v. Smith*, 48 Barb. 614; *Trevor v. Wood*, 41 Barb. 255; 36 N. Y. 307; *Booth v. Bierce*, 38 Id. 463; *Dana v. Munro*, 38 Barb. 528; *Baldwin v. Mildeberger*, 2 Hall, 176; *Tuttle v. Love*, 7 Johns. 470).

C. W. Town, for respondent.

BY THE COURT.*—DALY, CH. J.—The commission of the broker is earned when he procures a purchaser for the property at the price named, who is willing and able to take it. The purchaser's ability is to be assumed, unless the contrary appear; and when a contract in writing for the sale of the property, at the price asked, is signed by the owner and the purchaser, the broker has earned his commission, and his right to it is in no way affected by the subsequent refusal of the purchaser to fulfil the contract (*Glentworth v. Luther*, 21 Barb. 145).

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ.
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That this is the law is not disputed by the defendant; but he insists that the instrument in writing, though signed by Peter Gilmore, did not impose upon him any obligation to purchase the property; that he is not described in the instrument as a party to it; and that there are no words in it that bind him to anything, or by which he undertakes or agrees to do anything; that the legal effect of the instrument was, that the defendant was bound to sell the property for \$17,000 cash in thirty days, and that the purchaser might come at any time within that period, pay the purchase money, and demand the deed; for which right of option, election, or choice, he paid the \$75 acknowledged in the instrument to have been received by the defendant.

There is nothing upon the face of this instrument to show that this was a sale at the purchaser's option. The language used shows that it was an unconditional sale on the part of the defendant, except in the single feature that the balance of the purchase money was to be paid in thirty days. This is the plain import of the words, "This is to certify, that I, Samuel Kissick, *sell* to Peter Gilmore, for the sum of \$17,000, the house" (describing it), followed by the acknowledgment of a receipt of a part of the purchase money in these words: "and that I have received the sum of \$75," and that this was understood to be a partial payment of the purchase money, in my judgment, plainly appears from what succeeds: "the balance amounting to \$16,925 to be paid within thirty days."

There is no uncertainty here, either in respect to the property, the price or the time of payment. This agreement is in writing, the consideration appears upon the face of it, and there is an acknowledgment that a part of it has been received. This is not an offer by the defendant to sell, or a proposal to sell at the buyer's option within a given period on certain terms, but, as I have said, it is an absolute agreement to sell, which a court of equity would compel the defendant to perform, even though the instrument had been signed by him only (Fry on Specific Performance, c. ii, p. 75).

In the case of an offer, the vendor is at liberty to retract if the offer is not accepted when made, unless upon a sufficient

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consideration a specified time is given to the buyer to make his election, or the circumstances are such as show that it was necessarily understood that a reasonable length of time was to be given to him (*Mactier v. Frith*, 6 Wend. 103; *McCulloch v. The Eagle Ins. Co.* 1 Pick. 278; *Rontledge v. Grant*, 3 C. & P. 267; *Payne v. Cave*, 3 T. R. 148; *Eskridge v. Glover*, 5 Stew. & Post. 264; Story on Contracts, §§ 378 to 384).

In such a case the vendor cannot dispose of the property until the time limited has expired, unless the other party notifies him at an earlier period of his intention not to take it; the consideration received being sufficient to support the agreement on the part of the seller to keep the property until the time limited for the buyer to declare his option. There is nothing upon the face of this instrument to show that the \$75 was received by the defendant as a consideration for keeping the property thirty days that Peter Gilmore might have that time to elect whether he would take it or not. He had that time to pay the balance of the contract price, and that is all that can be gathered from the words of the instrument; and if his signature to the instrument is evidence of an acceptance, or, to express it more precisely, of his agreement to purchase the house upon the terms stated, an action could be maintained against him for damages or specific performance enforced in equity, the rule being that in contracts for the sale of land, the remedy in equity is mutual, and that the vendor can enforce the contract in all cases where the purchaser could sue for specific performance (Fry on Specific Performance, § 23; *Walker v. Eastern Co. R. Co.* 6 Hare, 594; *Withy v. Cottle*, 1 Sim. & Stu. 173; *Kenny v. Wexham*, 6 Mad. 356).

The signing of the instrument by Gilmore, and the payment of the \$75, is sufficient to show an acceptance and an agreement by him to purchase the house at the price fixed upon.

"It does not matter," says Story, "by what mode assent is expressed, provided it be intelligible, and it may be given by a nod, by shaking hands, taking off a shoe, drawing a shilling across the hands, &c." (Story on Contracts, § 378). He is, of course, speaking of verbal contracts. But here there was a payment of a part of the purchase money, and a delivery to

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Gilmore, and the acceptance by him, of an instrument in writing binding upon the defendant, and to which Gilmore subscribed his own name. Blackstone has pointed out the great regard which the law has always attached to the payment of earnest as evidence of a contract to buy (2 Bl. Com. 448), and Gilmore's subscribing his name to the instrument could have been for no other purpose than to indicate his consent to purchase the house upon the terms agreed upon.

The defendant has called our attention to the case of *Ackley v. Hoskins* (14 Johns. 374), in which it was held that a father by signing an indenture for the apprenticeship of his son, did not bind himself for the performance of a covenant in the instrument that the son would faithfully serve the master until he was twenty-one years of age. But the reason given for that decision clearly distinguishes it from the present case. The signature of the parent was necessary by statute to make the indenture binding upon the apprentice. The statute does not require any covenant on the part of the parent, but "has," in the language of the court, "furnished the master with the power of enforcing obedience from his apprentice, and compelling him to the performance of his stipulated service." The father might not be willing to bind himself to the performance of the stipulations contained in the indenture. "When, therefore," said the court, "we can account for the father signing, without making him a party to the covenant, we ought so to consider his meaning." A like decision was rendered in *Blunt v. Melchor* (2 Mass. 228), and it was held in a very early American case that a guardian signing the indenture could not release the master's covenant to pay the apprentice a certain sum at the expiration of his term (*Duntons v. Richards*, Quincy's Mass. Rep. 1761 to 1772, p. 67), all of which cases proceeded upon the ground that there was a reason for the parent or guardian signing the indenture, independent of being a party to the covenant.

But in the present case, we cannot account for Gilmore's putting his name to this instrument, except it were for the purpose of expressing that he agreed to purchase the house upon the terms stated in the writing. "What is necessary," said the

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court, in *Thomas v. Blackmore* (1 Col. C. C.), "is, that there should be a clear accession on both sides to the same set of terms;" and this took place as effectually when Gilmore put his name to the instrument as if the words, "and I Peter Gilmore *buy*," had been contained in the instrument after the words, "I Samuel Kissick *sell*." After paying the defendant a part of the purchase money, no other meaning but this could be attached to his subscribing his name to the paper, and taking it into his possession. A party who pays part of the purchase money, and afterwards refuses or neglects, without legal excuse, to pay the rest and take the deed, cannot recover back what he has paid, but that is because of his wrongful act in not fulfilling the contract, and not upon any assumption that the amount so paid is a consideration for the exercise of an option to take the property or not.

The judgment should be affirmed.

Judgment affirmed.

JANE H. VAN LOON v. AGNES LYON.

Where infinite mischief would ensue should the court in the construction of a statute adopt a different rule from that which has been long established, the court will yield the construction which it would otherwise put upon the words of the act, to that construction which is universally received, and has been long acted on.

The provisions of the district court act (L. 1857, ch. 344) having been interpreted to authorize the issuing of an attachment upon the giving of an undertaking in a certain form, and such interpretation having for fourteen years been accepted and acted upon by the justices of the District Courts and the counsellors of the Supreme Court, practicing therein, *Held*, that such interpretation of the act, even though erroneous, would be upheld, where the adoption of a different rule would cause great mischief.

It seems that to give a justice of one of the District Courts of the city of New York jurisdiction to issue an attachment, the applicant must give a bond such as is required by the Revised Statutes (§ 29, art. 2, tit. 4, ch. 2, pt. 3) in cases where

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attachments are issued by justices of the peace in suits for \$100 or less. Those provisions of the Revised Statutes are re-enacted by the district court act (Laws of 1857, ch. 344, § 20). *Per* J. F. DALY, J.

Proof of an admission by a person in debt that she had disposed of her property and was going to Canada to live, *Held*, sufficient evidence of a disposal of her property with intent to defraud creditors, to warrant the issuing of attachment against her.

APPEAL by defendant from a judgment of the 7th District Court. The facts are stated in the opinion.

Hubbard Hendrickson, for appellant.

Thomas Robinson, for respondent.

JOSEPH F. DALY, J.—The respondent, Jane H. Van Loon, commenced an action by attachment in the District Court of the 7th Judicial District in the city of New York, against the appellant, Agnes Lyon. To procure such attachment, the respondent gave an *undertaking* to the effect that if the defendant recovered judgment against the plaintiff, the sureties would pay to the defendant all costs and extra costs that might be awarded to her, and all damages that she might sustain by reason of the issuing of such attachment, not exceeding three hundred dollars. Judgment having been rendered against the defendant in such action, she appealed to this court, claiming that the District Court or justice had not acquired jurisdiction to issue the attachment by which the suit is commenced, because the plaintiff had not given a *bond* conditioned to pay defendant “all damages and costs which she might sustain by reason of the issuing of such attachment if such plaintiff fail to recover judgment thereon, and if such judgment be recovered, that such plaintiff will pay the defendant all moneys which shall be received by her from any property levied upon by such attachment, over and above the amount of such judgment and interest and costs thereon.” This latter is the form of bond required by the Revised Statutes to be given in order to procure attachments to be issued by a justice of the peace, when suits for \$100 or less are commenced before them by attachment (R. S. part 3, chap. 2, tit. 4, art. 2, sec. 29. See also Laws of 1831, chap. 300, sec. 34 and 35).

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This provision of law as to justices of the peace was in full force when the district court act of 1857 was passed.

By the latter act, under which the practice of the District Courts of this city is carried on, and by authority of which the attachment in the present case was supposed to be issued, it is provided that: "All laws in relation to the issuing of attachments by justices of the peace, when the debt or damages claimed do not exceed two hundred and fifty dollars, and of the service thereof, shall apply to these courts, except when the same may be inconsistent with this act" (Laws of 1857, chap. 344, sec. 20).

The next section (section 21) of the district court act, however, declares that: "Before a warrant or attachment shall issue, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts on which the application is founded, and the amount of his debt or claim over all payments and set-offs. The plaintiff must also execute and deliver to the clerk of the court a written undertaking, approved by the justice, with such approval indorsed thereon, with or without sureties, to the effect that if the defendant recover judgment, the plaintiff will pay to him all costs and extra costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which must be double the amount claimed."

It will be observed that, while section 20 of the district court act re-enacts and applies to those courts those provisions of law requiring a *bond* of a special form to be given as a prerequisite to the issuing of an attachment by a justice of the peace, unless inconsistent with other provisions of the act, section 21 of the same act would appear to provide for an *undertaking* to be given. But section 21 does not, in fact, provide for any undertaking adapted to the case of an attachment. There is full provision made for an undertaking upon arrest, and the form of it is set forth. One part of the section (the beginning of the second paragraph), by the use of the word "also," would seem, at first, to provide that an undertaking must be given before attachment as well as before warrant, but, as by

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the rest of the section it appears that only one form of undertaking is provided for, and only one undertaking is mentioned, and that one is applicable only to warrants of arrest, it must be held that but one undertaking was intended, and that for arrests, and not attachments. If an undertaking before attachment is required by section 21, then it is the one therein set forth, which is appropriate only to arrests, and not only affords no security to the defendant upon attachment, but would be meaningless and absurd as security upon attachment. In order to make sense of the section, my view is that the word "also," in the beginning of the second paragraph of section 21 should be construed to refer to proceedings before warrants of arrest only, for the section commencing from that paragraph, down to the end, manifestly provides for cases of arrest, and not of attachment. In order to avoid an absurd construction of a statute, we are bound to reject a provision seemingly literal, and to observe the spirit and intent over the mere letter, and my conclusion is that the 20th section of the act, by its sweeping re-enactment and application of the Revised Statutes and laws relative to attachments before justices of the peace to these courts, having made ample provision for attachments in these courts, there was no necessity for any provision as to security in section 21, and none was intended: the words "or attachment," in the first line of the section, serving only to involve the whole enactment in an absurdity. For, suppose it be conceded that the 21st section requires an undertaking before attachment, what is to be the form and substance of such undertaking? Not the form set forth in the 21st section, for that is meaningless, and offers no security upon attachment. The plaintiff in this case gave an undertaking, of a form and substance for which no authority is furnished—one made up without the aid of the act of 1857 or the former laws. Is it sufficient then, to give the justice jurisdiction, that any form may be used, so long as the instrument be an undertaking? If so, the substance of the security is in the discretion of the justice, and this amounts to no law at all. It has been suggested that an undertaking should be given containing the condition and substance of the bond under the Revised Statutes quoted above; that the 20th section of the act of

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1857 re-enacted all those provisions of the Revised Statutes not inconsistent with the act—that the provision for a bond is, of course, inconsistent with the provision for an undertaking, and that, therefore, the *form* of the security should be that of an undertaking, and not that of a bond, but that, as no provision is made for the substance of the undertaking, the substance of the former bond may be deemed to be re-enacted as the substance of the security to be given under the 21st section of the act of 1857.

I cannot accede to this view, nor understand how any part of the bond can be deemed to be re-enacted, when the bond itself is not to be used; nor how the substitution of one form of security for another security, of special and different force, form and effect, is consistent with the retention of any part of the latter; nor how the retention of any part of the bond is consistent with the rejection of that form of security. It would be necessary not only to incorporate the condition of the bond in the undertaking, but to devise a new instrument compounded of the two, and of a form which the provisions of no law authorize.

My view would be that held by Judge Robinson, on the first argument and decision of this appeal, viz., that the provisions of sec. 29, art. 2, title 4, chap. 2, of part 3 of the Revised Statutes are re-enacted by the 20th section of chap. 344, Laws of 1857, and that the giving the bond heretofore described is necessary to give the justices of the District Courts of this city jurisdiction to issue attachments for commencing actions.

The re-enactments of sec. 20 are not affected by the provisions of sec. 81 of the same act, chap. 344 of Laws of 1857, which repeals all statutes, laws, and rules theretofore in force, whether consistent with such act or not. Sec. 81 shows a general intent of the law-makers to repeal all laws, whether consistent or not; but sec. 20 shows a particular intent to re-enact the laws relating to attachments; and according to a familiar rule of the construction of statutes, the particular intent must be deemed to be an exception to the general intent, and must stand.

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But we are met at once with the serious objection to a decision reversing the judgment appealed from, on this ground, that ever since the passage of the act, chap. 344 of 1857, a period of over fourteen years, the invariable rule and practice of the justices of the District Courts in this city, and the practitioners in those courts, has been to construe that act as repealing, by inconsistency, the former provisions of law requiring a bond on attachments, and substituting therefor the undertaking of the form adopted by the plaintiff in this action—that a decision to the contrary would now be productive of endless litigations, suits for trespass, and actions of damages against the justices of the District Courts for proceeding without jurisdiction.

In the case of *McKeen v. Delancy's Lessee* (5 Cranch R. 32), the Supreme Court of the United States, *per* MARSHALL, Ch. J., decided in effect that if infinite mischief would ensue should the court, in the construction of a statute, adopt a different rule from that which has been long established in the State, the Supreme Court would yield the construction which would be put on the words of the act, to that which the courts of the State have put on it, and on which many titles may properly depend. In that case, the question depended upon the acts of the Legislature of Pennsylvania respecting the registering of deeds, requiring them to be acknowledged before one of the justices of the peace of the proper county or city where the lands lie. The deed in controversy was acknowledged before a justice of the Supreme Court. The Supreme Court held that it was not regularly proved, and if the act of the Legislature were for the first time then to be construed, the opinion of the court would be to that effect. But the gentlemen of the bar spoke positively as to the universal understanding of the State on this point. The judge, who presided in the Circuit Court for the district of Pennsylvania, reported that this construction was universally received (*i. e.*, that the acknowledgment was sufficient), and so the Supreme Court of the United States held.

A similar course was taken by the Court of Chancery in this State (*Meriam v. Harsen*, 2 Barb. Ch. 270), in the case of the

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construction of the statute requiring the word "freely" to be inserted in acknowledgments of deeds by *femes covert*s, where the word "freely," although required by the statute, had been omitted in many hundred acknowledgments taken before the judges of the Supreme Court, judges of county courts, masters in chancery, and commissioners, and received by recording officers, and considered and treated as sufficient for twenty-seven years. "This construction has prevailed so extensively, and for so long a period, that it possesses high authority, and to pronounce these certificates void would be a most dangerous innovation," is the language of this court.

In the matter before us a similar view may be taken. For fourteen years there has been a received and established interpretation of the statute under discussion in the District Courts of this city, among the justices and attorneys and counsellors of the Supreme Court practicing therein, and to disturb it now would be dangerous.

It is the conclusion of the court, for the above reasons, that the undertaking should be deemed sufficient, and that the justice could acquire jurisdiction therefrom.

We regard the affidavit as sufficient; the fact that the defendant, who was in debt, admitting that she had disposed of her property, and was going to Canada to live, leading to the irresistible inference that the intent was to escape the payment of the debt, and defraud the creditor.

The judgment must be affirmed, with costs; the defendant to have leave to go to the Court of Appeals.

LARREMORE, J.—I think the affidavit in this case is sufficient, and that the interpretation given to the act in question by the justices of the District Courts, and acted upon by them for fourteen years past, should not now be disturbed, for the reasons assigned by Judge DALY, in the foregoing opinion.

Judgment affirmed.

Lewis v. Bulkley.

JOHN D. LEWIS v. CHARLES E. BULKLEY.

Exemplary damages may be recovered for the *wilful* act of defendant in so managing his horse and carriage as to bring them into collision with, and cruelly wound and injure, the plaintiff's horse.

APPEAL by defendant from a judgment of the general term of the Marine Court, affirming a judgment entered on the decision of a judge at trial term. The facts are stated in the opinion.

G. W. Cotterill, for appellant.

Chauncey Shaffer and *Daniel T. Walden*, for respondent.

BY THE COURT.*—LARREMORE, J.—I do not see upon what ground this judgment can be disturbed on appeal. The only suggestion made upon this point at the argument was, that the damages recovered were excessive and unauthorized by the evidence.

It appears by the complaint that a recovery was sought by the plaintiff, because the defendant so carelessly and negligently and *wilfully* managed, controlled and conducted his horse and carriage, as to come in collision with one of plaintiff's horses, and thereby *cruelly* wounded and injured such horse. There was some evidence upon the question of wilful intent on the part of the defendant. Plaintiff testified that there was plenty of space for defendant to pass, but that he ran his horse against plaintiff's horse. When informed by plaintiff of the injury, defendant admitted the fact and said, "I will teach you the next time not to take up all the road." There is no express denial of this statement by the defendant or his witness (Reed).

The plaintiff is corroborated by the testimony of the witness Pierret.

There being some evidence to raise the presumption of a

* Present, DALY, Ch. J., LARREMORE, and J. F. DALY, JJ.

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wilful wrong on the part of defendant, the court below had authority to award damages by way of punishment (Sedgwick on Dam. 4th ed. 534, and cases there cited; *Elchberry v. Levielle*, 2 Hilt. 40).

It was shown by several witnesses that the mare in question was one of great value, of at least \$4,000. It was also shown that the effect of the injury upon the animal in question would be to greatly depreciate her value for the purposes of use and reliability, and the opinion of witnesses upon this point, who were shown to be familiar with the subject, was competent evidence to prove such diminution in value. Independent of any proof of actual pecuniary loss, the plaintiff is entitled to recover damages for wilful injury to his property. This the testimony shows, and this the court below had a legal right to determine, and its finding upon that question is conclusive.

I think the judgment should be affirmed.

Judgment affirmed.

JOSEPH BEGLEY AND OTHERS v. HORACE G. CHOSE AND OTHERS.

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On appeal to this court from a judgment rendered in a District Court, the notice of appeal required by § 858 of the Code of Procedure should point out clearly the error complained of, whether in the process, pleadings, proceedings on the trial, or in the rendering of judgment. It is not enough to state generally that the judgment appealed from is against both the law and the evidence, and should have been in favor of the appellants and against the respondents.

Where the notice of appeal states no more than this, the judgment will be affirmed, without an examination of the merits.

APPEAL by defendants from a judgment of the First District Court. The facts are stated in the opinion.

N. J. Wyett, for appellant.

H. J. Begley, for respondent.

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BY THE COURT.*—LARBEMORE, J.—It has been repeatedly held by this court that the notice of appeal required by section 353 of the Code of Procedure should point out clearly the error complained of, whether in the process, pleadings, proceedings on the trial, or in the rendering of judgment. In this respect, the notice of appeal in this action is defective. It states in general terms, that the judgment appealed from is against both the law and the evidence, and should have been in favor of the defendants and against the plaintiffs. These statements are too vague, and fail to point out the error complained of (*Lee v. Schmidt*, 1 Hilt. 537; *Kelty v. Jenkins*, 1 Hilt. 73; *Derby v. Hannin*, 15 How. Pr. 32). It does not appear in what particular the judgment in question is contrary to the law or the evidence in the case, and the application for a dismissal of the complaint will not be entertained in a court of review, when it appears by the record that no such relief was sought in the court below. There are no exceptions in the case as presented, and the appellants are concluded as to any objections not raised or passed upon at the trial.

The judgment appealed from should be affirmed, with costs.

Judgment affirmed accordingly.

CORNELIUS P. SCHERMERHORN v. FERNANDO WOOD.

In an action by an attorney for various services, including the management of suits in various courts, the drawing of deeds and other instruments, the examination of the titles to lands, charges for disbursements, &c., including many items; where a general denial is interposed; *Held*, that the trial of the issues involves the examination of a long account, and a compulsory reference may be ordered.

In such a case, a reference might have been ordered before the adoption of the Constitution of 1846, and a trial by jury is not a matter of right.

In such an action, if the answer allege payment, that question must be disposed of before the accounts can be examined, and as that is an issue which either party may require to be tried by a jury, a compulsory reference cannot be ordered, till that issue is disposed of.

* Present, DALY, Ch. J., LARBEMORE, and J. F. DALY, JJ.

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But an allegation in an answer to a complaint, claiming \$4,500 for professional services due February 11th, 1862, that on May 21st, 1860, defendant paid to plaintiff \$275 in full of all demands to that date, which sum is set off against any claims of the plaintiff, *Held*, not to be an allegation of payment, which, if found in favor of defendant, would determine the action against the plaintiff, and that a compulsory reference might be ordered of all the issues.

It is no ground for reversing an order of reference that on the trial one party intends to impeach, as forged, evidence which he expects will be offered by his adversary. Such fact is proper to be presented to the court on the motion for the order, but the decision thereon is conclusive.

APPEAL by plaintiff from an order of this court made at special term, referring the action to a referee to hear and determine the issues.

Cornelius P. Schermerhorn, appellant in person.

James M. Smith, for respondent.

BY THE COURT.*—JOSEPH F. DALY, J.—It seems clear that the order of reference made by the learned judge at special term, on December 14th, 1870, cannot be sustained unless this was a referable case, independent of any previous order of reference made on consent or otherwise. The motion for a reference, which was determined by the order now appealed from, was made by the defendant upon the pleadings and bill of particulars in the action, and upon an affidavit setting forth that the trial of the action would involve the examination of a long account, that the plaintiff's claim consists of over forty items, and the defendant's counter-claim consists of more than eighteen items, also that an order of reference was theretofore made by Judge Brady to Hon. Hamilton W. Robinson, and that Mr. Robinson has since said order was made been elected as one of the judges of this court, and cannot act as referee in this action. This latter statement in the affidavit could not, of course, be advanced as a ground of making a new order of reference, and must have been inserted to show that either the court or the parties had formerly deemed the issues proper to be referred. It is conceded that a reference was originally

* Present, DALY, Ch. J., ROBINSON, and J. F. DALY, JJ.

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ordered by Judge Brady to the Hon. Hamilton W. Robinson, that the trial proceeded before him as referee, but he took his seat on the bench of this court pursuant to election before any decision had been rendered by him. Both parties to the action seem to treat that reference as at an end, the defendant by making a motion for another reference on the pleadings, bill of particulars and affidavit setting forth a long account, and the plaintiff by claiming the cause to be not referable under the Code, and claiming the right to a trial by jury. As the order of Judge Larremore on such motion was not an order continuing the former reference, nor an order substituting a new referee under the original order, but an order referring the issues *de novo*, it must be sustained under § 271 of the Code, without regard to the former order of reference made by Judge Brady.

This action was brought to recover the sum of \$4,500 for professional services as attorney and counsellor at law, rendered by the plaintiff to the defendant, at the defendant's request, and is therefore an action founded on contract. The services are claimed to be the prosecution and defense and proceedings had and taken in divers suits and actions in the Supreme Court, Superior Court, and Court of Common Pleas, and other courts of the city of New York, for costs, attorney and counsel fees, disbursements paid, drawing and engrossing divers conveyances, deeds, contracts, bonds, mortgages, releases, and other instruments in writing, making searches in the register's and county clerk's offices, the United States Circuit and District Court clerk's offices, and the tax and other offices of said city, for and concerning mortgages, judgments, decrees, taxes, assessments, sales, liens, and incumbrances, against or in any manner affecting certain lots, pieces or parcels of land situate in the city of New York, disbursements paid on account thereof, the examination and investigation of titles to land, preparing drawing and engrossing abstracts of title, &c., &c. The plaintiff also alleges in his complaint "that the items of his accounts and demands exceed twenty in number." It is clear that the investigation of the plaintiff's claim involves the examination of a long account. An attorney's bill of charges against his

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client involving items of service in nearly every department of the profession, if disputed as to correctness of items or value of each service, or the aggregate value, presents a question of fact or issue as to each item tedious in the extreme, and as much the province of a careful referee to examine as it would be unfit for the examination of a jury. The action then being on contract, and involving the examination of a long account, is referable, under sec. 271 of the code, and a reference may be compulsorily ordered by the court. It is of the class of cases referable in this State before the adoption of the constitution of 1846. The reasoning in the case of *Townsend v. Hendricks*, in the Court of Appeals (40 How. Pr. 143), applies to this case.

The answer of the defendant denies that on the 11th February, 1862 (the date of the verification of plaintiff's complaint), the defendant was indebted to the plaintiff in the sum of \$4,500, for any services, or for any cause or consideration; and denies that he is indebted to plaintiff in any sum whatever. The defendant, in his answer, also sets up, by way of set-off to any claim plaintiff may establish against him, certain sums for moneys advanced by him to plaintiff, and property of his taken by plaintiff. The defendant, in his answer, also avers, that on or about May 21st, 1860, he paid to the plaintiff the sum of \$275, in full of all demands to the date last aforesaid, which said sum defendant demands shall be set off against any claims the plaintiff may have against him, and that the defendant have judgment for the balance.

On this appeal, the plaintiff raises the point that the defendant having pleaded payment, that issue must be tried before the account or items of claim and counter-claim can be inquired into; and as the issue as to payment must be tried by a jury, and is not a referable issue, except by consent, the order of reference is premature, and, if made at all, cannot be made until the question of payment is disposed of by trial in court.

The appellant correctly states the law, that where payment is alleged by the answer, that question must be disposed of before the accounts can be examined; because, if proved, it dis-

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poses of the whole case, and there are no accounts to be examined (*Keeler v. Poughkeepsie, &c. P. R. Co.* 10 How. Pr. 11; *Mitchell v. Stewart*, 3 Abb. Pr. N. S. 250, and many other cases).

The allegation of payment must, however, be such as, if proved, will dispose of the plaintiff's whole claim. Where money is alleged to be due; and the defendant proves payment of the sum, and there is no question of value of service, nor as to rendering the service on which the claim arises, that disposes of the whole case. But inasmuch as the payment of a smaller sum is no satisfaction of a larger, the allegation that, on May 21st, 1860, the defendant paid to plaintiff \$275, in full of all demands to that date, is not a plea of payment to a claim of \$4,500 for professional services due February 11th, 1862. And particularly is it to be observed that no plea of payment is made or intended, since defendant sets off that sum of \$275 "against any claims the plaintiff may have against him, and that defendant may have judgment for the balance."

There is no plea of payment, in a legal sense, in the answer. It may be that on May 21st, 1860, the date when \$275 was "paid in full of all demands," there was but \$275 due or claimed by plaintiff; but there is certainly no plea that there has been any payment or settlement of the claim for which the action is brought. The issue as to whether the defendant paid \$275 on May 21st, 1860, in full of all demands to that date, cannot be first tried in this action, because it could not, if found in defendant's favor, determine the action against the plaintiff.

The point made by the appellant, that questions of fraud may or will arise on the trial, because he intends to show that receipts, &c., which the defendant may produce to sustain his counter-claims, are false or forged, will not avail against the order of reference appealed from. This action is in its nature one arising *ex contractu*, and there is no issue involving fraud. In any action upon contract, a receipt, entry in a book, or other document, may be impeached as false or forged; but the issue thus arising is incidental merely, and does not alter the character of the action. In the same way it may be said that the perjury of witnesses is at issue when they give conflicting testi-

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mony in simple contract actions. The point was a proper one to make before the judge who heard the motion to refer; but if, in his discretion, he did not refuse the order on that ground, his decision on the point is not reviewable here.

The order appealed from should be affirmed, with ten dollars costs.

Order affirmed accordingly.

CATHERINE SCULLIN v. WILLIAM DOLAN.

The plaintiff was injured while passing along the public street, by the falling of the stone coping from defendant's chimney. But, it not appearing that the chimney was insecure, or unfit for the purpose for which it was intended, and it being shown that the stone coping was accidentally thrown off the chimney by a third person, while in the improper and unauthorized use of it, *Held*, that the defendant was not liable as for negligence, and a nonsuit should have been directed.

EXCEPTIONS to a judge's charge to the jury ordered to be heard at general term.

Action for defendant's negligence, whereby a piece of the coping of the chimney on defendant's house fell and injured plaintiff, who was passing by on the sidewalk. On the trial it appeared, by undisputed evidence, that the injury occurred in the following manner: Several of the occupants of defendant's tenement house, in Mulberry street, were on the roof engaged in beating a carpet. One of them, a boy named McCarthy, got on the railing surrounding the roof, in order to fix or attach a rope to one of the poles. His foot slipped, and in falling, to save himself, he caught the coping of the chimney, and pulled or pushed a piece of it off, which fell on the slanting roof of the adjoining house, and slipped thence to the street, striking the plaintiff on the way. The judge charged that, if the chimney was in an improper condition, defendant was liable, without

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regard to the act of the boy which caused the coping to fall. Defendant excepted to this direction.

F. Smyth, for defendants.

Negligence being the foundation of this action, the defendant cannot be held liable for the acts of any person other than his servant or agent, and it was conceded that McCarthy was neither (*Eakin v. Brown*, 1 E. D. Smith, 44; *Gourdier v. Cormack*, 2 Id. 200; *Blake v. Ferris*, 5 N.Y. 48; *Pack v. Mayor, &c.* 8 Id. 222; *Wright v. Wilcox*, 19 Wend. 343; *Clark v. Foot*, 8 Johns. 421; *Moore v. Goedel*, 7 Bosw. 591; *Stevens v. Armstrong*, 6 N. Y. 435; *Robbins v. Mount*, 4 Rob. 553).

B. F. Einstein, for plaintiff.

The circumstance of the boy McCarthy, between whom and the plaintiff there was no privity, having displaced the fatal stone, upon the presumption that he had no right to be where he was, does not relieve the defendant from liability, but only adds another party to the negligence (*Webster v. Hudson R. R. R. Co.* 38 N. Y. 260; *Sheridan v. Brooklyn & New R. R.* 36 Id. 39; *Clark v. Eighth Ave. R. R. Co.* Id. 135; *Brown v. N. Y. C. R. R.* 32 Id. 597; *Althorf v. Wolf*, 22 Id. 355; *Colgrove v. N. Y. & N. H. R. R. Co.* 20 Id. 492; *Chapman v. N. H. R. R. Co.* 19 Id. 341; *Congreve v. Morgan*, 18 Id. 84; *McCahill v. Kipp*, 2 E. D. Smith, 413; *Shearm. & Redf. on Neg.* § 46).

BY THE COURT.*—LARREMORE, J.—The evidence in this case fails to establish any liability on the part of the defendant, and would have justified a peremptory instruction to that effect by the court below. There can be no doubt that the owner is responsible for his negligence either in constructing or upholding the freehold (*Eakin v. Brown*, 1 E. D. Smith, 36), but for the negligent use of it by others, he cannot be made liable. He has met the requirements of the law when each and

* Present, DALY, CH. J., ROBINSON and LARREMORE, JJ.

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every part of the building is properly and securely adapted to its particular use.

It is not shown that the chimney in question was unfit for the purpose for which it was intended, and the improper and unauthorized use of it for any other purpose, whereby a third party was injured, cannot create a liability on the part of the owner.

I think the exceptions upon this point were well taken, and that the defendant should have judgment in his favor.

Judgment for defendant.

SUSANNAH VAN SAUN v. ANN FARLEY.

In order to set in motion the short limitation, in favor of an executor or administrator, due notice of the rejection of the claim presented to him by the creditor must be given to the creditor himself. A notice to an attorney, who had been employed by the creditor to make out in legal shape and present the claim, is not notice to the creditor.

APPEAL by defendant from a judgment of this court, entered on the decision of a judge at trial term. The facts are as follows:

James Farley and Evariste Martin were on the first day of July, 1865, copartners under the name of Martin & Farley, and on that day made and indorsed the promissory notes in suit, and delivered the same to the plaintiff.

Prior to the 1st of July, 1865, the plaintiffs, James Farley and Evariste Martin were copartners, and at about that date the firm was dissolved, and Madam Farley agreed to hold the plaintiff harmless from all costs, losses or expense on account of the firm of Van Saun, Martin & Farley, which firm then owned a lease of certain premises, the yearly rent of which was \$3,000, and payable quarterly. Of this rent the plaintiff was compelled to pay \$1,500. James Farley died intestate January 19th, 1866. The defendant, Ann Farley, was appointed his admin-

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istratrix January 26th, 1866, and pursuant to an order of the surrogate, dated September 4, 1866, inserted a notice once in each week, commencing September 15th, 1866, in two newspapers published in the city of New York, requiring all persons having claims against the estate of James Farley to present the same to her at the office of Callaghan & McGurk, No. 39 Nassau street, on or before March 20th, 1867.

The plaintiff employed Thomas D. Robinson, an attorney and counsellor at law to prepare and present her claim, pursuant to said notice, and on the 16th day of March it was duly presented by Robinson, and on the 22d day of March, 1869, Callaghan & McGurk, acting as the attorneys for the defendant, served at the office of Thomas D. Robinson a notice in these words:

“TO SUSANNAH VAN SAUN—

“The claims presented by you against the estate of James Farley, deceased, on the 16th day of March, 1867, amounting in all to the sum of \$25,184 $\frac{26}{100}$, are disputed and rejected by the administratrix of the said estate.

“Dated, New York, March 22d, 1867. Yours, &c. (signed),
CALLAGHAN & MCGURK, Attorneys for ANN FARLEY, Administratrix of estate of JAMES FARLEY, deceased.”

On or about the same day the notice was brought to Robinson's attention, but never prior to the commencement of this action came to the knowledge or notice of the plaintiff.

In February, 1869, the plaintiff offered to refer her claim. In June, 1869, this action was commenced to recover a portion of the items embraced in the claim presented to the defendant.

The answer of the defendant was that the causes of action mentioned in the complaint were barred by the short statute of limitations.

P. Callaghan and W. Gleason, for appellant.

Amos G. Hull, for respondent.

BY THE COURT.*—VAN BRUNT, J.—The only question which

* Present, DALY, Ch. J., VAN BRUNT and LARREMORE, JJ.

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it is necessary to consider in this case is, was the claim rejected by the defendant? It is claimed, upon the part of the defendant, that the service of the notice of rejection at the office of Mr. Robinson, on the 22d day of March, 1867, was sufficient to set the short statute of limitations in motion, and consequently this action, not being brought within six months after the alleged rejection of the claim, is barred by that statute.

It will not be pretended that a mere rejection of a claim, without notice of such rejection to the owner of the claim, would set the statute in motion, because there is no other way than such notice by which the owner of the claim can be made aware that his action must be commenced within six months after such rejection, or his right to bring an action will be lost. The statute does not mean, by rejection, merely a mental emotion, but the action of the mind must be followed by some outward act by which the owner of the claim may be apprised of the result arrived at. It has been repeatedly held that this statute, unlike the other statute of limitations, is not a statute of repose, but is rightly penal in its character, and should be strictly construed (*Broderick v. Smith*, 3 Lans. 27, and cases there cited).

The party then invoking the aid of the statute must show a strict compliance with all its provisions. We have already shown, that in order to make a rejection of a claim complete, notice must be given to the owner of such claim. In this case, such notice was left at the office of the attorney who was employed by the plaintiff to make out her claim in legal shape, and cause it to be properly presented. Mr. Robinson was her attorney for this purpose, and there is no evidence that he was such for any other purpose. If defendant chose to serve the notice of rejection upon Mr. Robinson, it was her duty to show that the plaintiff had authorized him to act for her in the receipt of such a notice of rejection. No such authority is shown. Nothing is to be implied in order to enable the defendant to avail herself of the statute. It appears that prior to the commencement of this action, the plaintiff never was apprised of the existence of such a notice of rejection, and for the reasons above stated, we are of the opinion that the service of the notice upon Mr. Rob-

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inson was not sufficient to set the statute in motion, and debar the plaintiff from commencing this action after the lapse of six months from the time of the service of such notice.

The judgment must be affirmed, with costs.

Judgment affirmed.

JOSEPH MAIER v. ANDREW HOMAN AND JACOB WERNZ.

An agreement not to engage in a particular business, unless it be restricted as to time and place, is void.

Where the verdict is rendered on incompetent testimony, and there is a well founded reason to believe that justice has not been done, the judgment will be reversed, even though there was no exception taken on the trial which would on appeal present the question of the incompetency of the evidence.

APPEAL by plaintiff from a judgment of this court entered upon a verdict at trial term ; also, appeal from order denying plaintiff's motion for a new trial.

The action was brought upon a promissory note for \$500, dated July 1st, 1867, at six months, made by defendant Homan, and indorsed by defendant Wernz. The answer alleged that this note and another of like amount were given by defendant Homan upon the purchase by him of the interest of the plaintiff in the copartnership formerly existing between them ; that the plaintiff, as part consideration of the notes, agreed that he would not engage in the same business again in the city of New York, and the breach of such agreement ; that plaintiff obtained the notes by fraud.

The first note was paid before this suit was brought.

D. McAdam, for appellant.

A. H. Reavey, for respondent.

LARREMORE, J.—It appears, by positive testimony, that the

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property of the copartnership, at the time of its dissolution, was worth the sum of \$2,000, independent of the alleged exclusive right to carry on the business of the firm. It cannot be pretended that Homan did not receive an equivalent in property for the amount of the notes given in payment.

There was no such evidence of fraud or wilful misrepresentation as would justify the finding of the jury in this case. Nor does it appear that the notes were given upon the faith of an agreement that the plaintiff would not engage in the same business *in the city of New York*. The defendant swears, "plaintiff told me if I would buy his share in the cabinet business, he (plaintiff) would cease being in that trade."

Even regarding this statement as a part consideration of the sale, it is void as a defense, in that it is unlimited as to time and place (*Chappel v. Brockway*, 21 Wend. 157; *Dunlop v. Gregory*, 10 N. Y. 243).

It may have been the honest intention of the plaintiff, at the time he made such statement, to relinquish the business in which he was then engaged. But that such intention was made a condition of the sale, for a breach of which the sale might be avoided, is not, in my judgment, established by the evidence.

The verdict is against the evidence, and although the jury have passed upon the question of fraud, it is the duty of the court to grant a new trial (*Vance v. Phillips*, 6 Hill, 436).

It is true, that there was no sufficient exception taken at the trial, but where (as in this case) there is a well founded reason for believing that justice has not been done, and that the verdict was rendered on incompetent testimony, it is just and proper for the court to interpose its authority and grant relief.

The judgment appealed from should be reversed on payment of the costs of the trial, and a new trial ordered.

DALY, CH. J., concurred.

JOSEPH F. DALY, J. [dissenting].—I cannot agree with my associates. The case was tried and submitted to the jury on a question of fraud affecting the consideration of the note. The appellant attacks the verdict on several very strong

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grounds, which, however, were not taken at the trial. There are no exceptions in the case which can disturb the judgment, and the attention of the court below was not called in any instance to the objections now urged against the defendant's case. The judge was not asked to instruct the jury on any point of law, and no objection was made to his leaving the question of fraud to the jury as the only question in the case.

The appeal from the order denying the motion for a new trial does not assist the plaintiff. A new trial is not the right of the defeated party where the whole trial was conducted on a theory of law and fact to which he assented. It is too late after verdict to urge objections which, if made at the trial, could have been easily obviated. New trials will be granted where the court errs in submitting the case to the jury upon a theory of law which is not sustained by any facts in evidence, even if the defeated party has taken no exception; but where there are several theories to which the facts are applicable, and the trial is conducted upon one of them, and no objection is made to it, a new trial should not be granted. It seems from the opinion of the judge given upon the motion for a new trial, that the points on which the motion was made were then presented for the first time.

The case was submitted to the jury on the question of fraud. If they found the plaintiff guilty of fraudulent misrepresentations, as an inducement to the transaction by which he got the notes, the defendants were entitled to judgment. It was not necessary that the whole contract should be rescinded and disaffirmed, or an offer made to that effect by the defendant, in order to avail himself of the defense of fraud. Fraud may be a bar to recovery without other rescission or repudiation of the transaction. In this case, the contract could not be rescinded by the defendant alone. On the sale he gave two notes, and one of them he paid before he discovered the fraud. The plaintiff having that money in his pocket, cannot demand a disaffirmance on the defendant's part.

The judgment should be affirmed.

Judgment reversed.

COLEMAN BENEDIOT v. NATIONAL BANK OF THE COMMONWEALTH.

Where a person has been induced to enter into a contract by fraud, he may, upon discovering the fraud, elect, either to rescind the contract and sue in tort, or to waive the tort and affirm the contract, but having once made his election, he is bound by it, especially where the rights of third parties have intervened.

The fact that the fraud used to induce a party to make a contract constitutes a felony, does not prevent the party deceived from affirming the contract; as a waiver of a tort in a civil action would not prejudice a criminal action for the felony.

The plaintiff having been induced to make a loan on call on the security of forged bonds, after discovering the fraud, sued on the contract, and attached the money standing to the credit of the borrowers in the bank in which they had deposited the proceeds of the fraudulent loan, but proceedings in bankruptcy having been taken against the defendants in that suit, he discontinued and brought an action in tort against the bankrupt and his assignee in bankruptcy, claiming that the money in the hands of the bank was the identical money obtained from him by fraud, and that he was entitled to it as owner. *Held*, that by the proceedings in the first suit he had elected to affirm the contract and was barred from bringing a second suit founded in tort.

APPEAL by plaintiff from a judgment of this court, entered on a decision of a judge at trial term.

The facts are as follows: On December 8th, 1869, the plaintiff loaned the firm of Wm. E. Gray & Co. the sum of \$10,000 by a check for that amount, which was deposited by, and placed to the credit of, Gray & Co. in the National Bank of the Commonwealth. As collateral security for such loan, the plaintiff received a \$1,000 United States bond, and what purported to be a \$10,000 bond of the State of New York. On December 10th, 1869, the plaintiff made a further loan to the same firm of \$25,000, by a check for that amount, which was deposited and placed to their credit as aforesaid. The plaintiff also received as collateral security for this last mentioned loan, a United States bond for \$15,000, and what purported to be a \$10,000 bond of the State of New York. Both of the \$10,000 bonds of the State of New York proved to be forgeries.

The checks of the plaintiff were deposited with other mon-

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eys, and mingled with the general fund belonging to the firm of Wm. E. Gray & Co., in the Bank of the Commonwealth, from which payments were made from time to time, upon numerous drafts drawn by them thereon. On December 11th, 1869, both Gray and Pratt (composing the firm of Wm. E. Gray & Co.) absconded, and, at that time, there was a balance to their credit in said bank of \$18,253 23. The plaintiff, then fully cognizant of the fact that the State bonds were forgeries, commenced a suit upon contract against the firm of Wm. E. Gray & Co., asking judgment for \$35,000, the amount of said loans and interest. On the same day he procured an attachment against the property of the firm, upon an affidavit showing their indebtedness to him for the amount of \$35,000, the forgery of the bonds and that the debtors had absconded. This attachment was served on the Bank of the Commonwealth, December 11th, 1869. On the 16th of December, 1869, the plaintiff, with full knowledge of the fraud, sold the valid securities, and credited the proceeds of the sale upon the original indebtedness of Gray & Co. to him.

On January 5th, 1870, a petition for the involuntary bankruptcy of Gray & Co. was filed, and an injunction was issued in pursuance of the bankrupt act, enjoining the plaintiff and the sheriff from interfering with the property of the bankrupts. On February 12th, 1870, the defendant Ingraham was appointed assignee of Gray and Pratt, and received an assignment of their estate in conformity with the act. In April, 1870, on consent of the plaintiff's attorneys, such attachment was dissolved. On April 22d, 1870, this action was brought to recover the balance due the plaintiff from said firm, out of the moneys held by the Bank of the Commonwealth, to their credit. The bank resisted such payment on the ground that the amount thus held, was claimed by parties other than the plaintiff.

The court below decided that the funds deposited with said bank belonged to the defendant, as assignee in bankruptcy, and from the judgment entered thereon appeal is taken.

Andrew Boardman, for appellant.

I. The assignee in bankruptcy has no better title to the

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fund in bank than Gray and Pratt. The question is whether they could dispute the plaintiff's title to that money (*Mickles v. Townsend*, 18 N. Y. 575; *Bush v. Lathrop*, 22 Id. 535; *Hartley v. Tatham*, 2 Abb. Ct. App. Dec. 333; *Smith v. Felton*, 43 N. Y. 419).

II. Equity favors the person wronged as against the wrongdoer to the extent of its power, and is astute and diligent to restore to him his property or its equivalent. (a.) Thus if a trustee apply money of a trust estate to his own use, equity will follow it to wherever it can be tracked, and impress upon it the conditions of the trust (*Aberdeen Railway Co. v. Blaiklie*, 1 Macy, 461; *Gardner v. Ogden*, 22 N. Y. 327; *Colburn v. Morton*, 3 Keyes, 296). (b.) The doctrine of resulting trusts is based on this equitable principle of allowing a party to follow his funds or property into whose hands soever they can be traced (*Reid v. Fitch*, 11 Barb. 399; *Swinburne v. Swinburne*, 28 N. Y. 568). (c.) In its determination to see that justice is done, a court of equity will disregard the legal and technical rules which would govern in a court of law (*Smith v. Felton*, 43 N. Y. 419). (d.) Even at law, "an action for money had and received, is maintainable whenever the money of one man has, without consideration, got into the pocket of another" (*Hudson v. Robinson*, 4 M. & Sel. 475; *Clark v. Shee*, 1 Cowper, 197; *Marsh v. Keating*, 1 Bing. N. C. 198).

III. It is clearly just that the plaintiff should be allowed, as against Gray & Pratt, to receive back the money which they obtained from him by fraud and felony, and this can readily be done in this case (*Grand Trunk R. Co. v. Edwards*, 56 Barb. 408; *Jackson v. Anderson*, 4 Taunt. 24; *Graves v. Dudley*, 20 N. Y. 76; *Gordon v. Hostetter*, 37 Id. 99). Even at law, a person who *fraudulently* mingles the money or property of another with his own, cannot be permitted to urge such admixture as a reason against restoring that which he has fraudulently obtained (*Silbury v. McCoon*, 3 N. Y. 379; *Ryder v. Hathaway*, 21 Pick. 298; *Seymour v. Wyckoff*, 10 N. Y. 213; *Beach v. Forsyth*, 14 Barb. 499).

IV. The act of the plaintiff in commencing proceedings against the property of William E. Gray & Co. does not estop

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the plaintiff from maintaining this action. If the act of the plaintiff may be deemed an agreement to waive the tort, it was certainly an agreement coupled with a condition, the condition being to waive it, provided he could retain his attachment. Being deprived of that, the condition failed, and the agreement and election fell with it and became void (*Hurst v. Gwennap*, 2 Stark. N. P. 306; *Morris v. Robinson*, 3 B. & C. 196; *Bivin v. Morris*, 4 Tyrr. 485; *Valpy v. Sanders*, 12 Jurist. 483).

V. In cases of felony there is no power to waive the tort. It can neither be waived, compounded, compromised nor ratified, and there is, therefore, no right of election to make such waiver (*Spread v. Morgan*, 11 H. L. Cases, 588, 13 L. T. N. S. 164; *Brooke v. Hook*, 24 L. T. Rep. N. S. 34; *Duncan v. McCullough*, 4 S. & R. 487; *Chesterfield v. Jansen*, 2 Ves. 125).

John E. Burrill, for respondents.

I. The action commenced by the plaintiff to collect the debt, with full knowledge that it had been fraudulently contracted, was a waiver of the tort and an affirmance of the contract, and the plaintiff thereby made his election, and was not at liberty afterwards to disaffirm the contract and proceed in tort (*Morris v. Rexford*, 18 N. Y. 552; *Adams v. Sage*, 28 Id. 103; *Wilmot v. Richardson*, 6 Duer, 328; *Kinney v. Kiernan*, 2 Lansing, 492).

II. The money fraudulently obtained by Wm. E. Gray & Co. cannot be traced, so as to show that the money in bank is the identical money borrowed (*Carol v. Cone*, 40 Barb. 220; *Marsh v. Oneida Central Bank*, 34 Id. 298; *Beckwith v. Union Bank*, 9 N. Y. 211; *Chapman v. White*, 6 Id. 412; *Dykers v. Leather Bank*, 11 Paige, 616).

BY THE COURT.*—LARREMORE, J. [after stating the facts].—The principal questions involved in the consideration of this case are :

1st. Did the plaintiff, after full knowledge of the fraud, affirm the contract ?

* Present, DALY, CH. J., ROBINSON, and LARREMORE, JJ.

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2d. Is he entitled to the fund held by the bank, or any portion thereof, as the property loaned by him to Gray & Co.?

It is a well settled principle of law that an innocent party to a fraudulent contract may rescind it, and sue in tort for the recovery of the identical property with which he has parted possession. And the rule is of equal authority that he may affirm such contract and waive the tort. He cannot have both remedies, because they are inconsistent with each other. He must make his election, and having made it, must be held to it (*Morris v. Rexford*, 18 N. Y. 552, and cases there cited; *Adams v. Sage*, 28 Id. 103; *Wilmot v. Richardson*, 2 Keyes, 519). He cannot be allowed, even though mistaken in his remedy, to change it, especially when the rights of third parties have intervened. Judged by this theory, it will scarcely be claimed that the plaintiff had a meritorious cause of action.

On the 11th of December, 1869, with a full knowledge of the fraud committed upon him, he voluntarily commenced an action on the contract for money loaned, and procured an attachment against the property of Gray & Co. It is urged that plaintiff was then ignorant that the proceeds of his checks had been deposited and were then held by the Bank of the Commonwealth.

But it is admitted that on the *same day* he caused his attachment to be served on the bank where the moneys in question were deposited and which were held by the bank under the attachment, as the property of Gray & Co. Plaintiff must have known, after the process had been served, that the checks had been so deposited, and that Gray & Co. had a cash balance in the bank. Yet he continued the lien of his attachment upon the very fund in dispute, as the property of Gray & Co., and only consented to a dissolution of it when such a course became imperative by the proceedings in bankruptcy.

I think plaintiff exercised and manifested his election in bringing his action on the contract, and that the subsequent discontinuance of the proceedings then taken could not change the legal effect of his action. He had full knowledge of the fraud, and the decision then made, although it might have been influenced, could not be impaired, by his want of knowledge

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as to what disposition had been made of the proceeds of the checks.

Having, in the first instance, treated the fund as the property of the debtors, he cannot now escape the consequences of his own deliberate act, nor prejudice the rights of other creditors to the fund. It is not disputed that the assignee in bankruptcy is entitled to the moneys now held by the bank if they belonged to Gray & Co., and I think the finding of the court below upon this point was correct.

Having reached this conclusion, it can hardly be necessary to examine the second branch of the case.

It may be observed, however, in this connection, that the checks given by plaintiff to Gray & Co. were deposited by them in bank and mingled with a general fund from which various sums were drawn from time to time on their account. Whether the identical proceeds of those checks have already been drawn out, or any portion thereof, and if so, what amount, or what now remains, are questions of doubt and uncertainty. An inspection of the bank account shows the impossibility of ascertaining such a result by any process of reasoning or mathematical calculation.

The cases cited by the learned counsel for the appellant, do not meet the question of waiver and affirmance that was raised in bar of this action.

Graves v. Dudley (20 N. Y. 76) decides that on an executory contract upon which \$250 in bills had been delivered, specific performance might be maintained for the recovery of the money; that there was nothing in the nature of money or bills to make a delivery work a change of ownership, when such was not the intention, or to prevent them from being specifically recovered when so identified that delivery might be made.

Gordon v. Hostetter (37 N. Y. 99) holds that where money is embezzled, an action for damages will lie without proving the specific property taken and converted.

In the *Grand Trunk Railway Co. v. Edwards* (56 Barb. 408), it was held that one who receives money from an agent, knowing that it belongs to the principal, is liable in an action

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for conversion where the money has not been mingled with other money, so as to render it incapable of being identified.

Silisbury v. McCoon (3 N. Y. 379) is an authority that property taken from the owner by a wilful trespasser, and by him converted into a thing of different species (such as corn into whiskey), may be recovered by and belongs to the owner of the original material.

Seymour v. Wyckoff (10 N. Y. 213) holds that pork packed in barrels, consigned to commission merchants for sale, does not lose its identity by being stowed with a large quantity of the same quality and brand.

It is obvious that the decisions in the cases referred to rest mainly upon the fact that the property sought to be recovered could be identified. They were cases also in which the parties injured sued the *wrong-doer*, and where it was clear that no absolute surrender of ownership was intended.

It was also claimed that in a case of felony there is no power to waive the tort; that the plaintiff would have no right to compound the forgery, and thereby prevent a criminal prosecution of it. This is undoubtedly true, but such a prosecution can in no way be prejudiced by a *waiver* of the tort in a civil action. Besides, the perpetration of the forgery, or the knowledge of it by Gray & Co., is not conclusively established. It is true that they absconded on the very day upon which the second check was given, but the loans were negotiated by the agent of Gray & Co., and it would still be competent for them to show in a criminal proceeding against them that they both took and pledged the bonds in question in the belief that they were genuine.

I think the judgment in this case should be affirmed.

Judgment affirmed.

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JAMES GRAHAM AND ANOTHER v. JOHN FITZGERALD.

Estoppels are created between parties to a transaction from their failure to speak when good faith requires they should do so, or by giving misinformation as to matters which, from the nature of the transaction, tends to influence the conduct of the party with whom they are dealing. But third parties in some way connected with the subject of such dealings cannot be affected in their rights therein, unless apprised of the character of the intended action, of the materiality of the information sought, and unless they designedly give such misinformation as is acted upon to the prejudice of the inquirer.

A quantity of rice, in possession of defendant, who had a lien on it for the money due him for cleaning it, was bought by plaintiffs, who informed him of their purchase, and he allowed them to take away a portion of the rice, but did not inform them of his lien. Afterwards, plaintiffs having paid in full for the rice, the seller failed, and defendant refused to deliver the balance of the rice without payment of his charge for cleaning. *Held*, that he was not estopped from enforcing his lien by his failure to give notice of it to plaintiffs, since his possession of it was constructive notice of whatever rights he had in regard to the property, and that he was under no obligation to give actual notice to the purchasers.

Possession of property constitutes notice to every one of the title of the possessor.

APPEAL by defendant from a judgment of this court entered on a verdict at trial term.

Replevin for 91 bags of rice, which defendant claimed to hold by virtue of a lien for cleaning a cargo of rice, of which said 91 bags formed a part.

On September 13th, 1867, plaintiffs, through O'Shaughnessy, their broker, purchased of one Hubbell 301 bags of rice (of which the quantity in question formed a part), which were in the possession of defendant, a cleaner of rice.

Plaintiffs paid Hubbell for it in full, and took away part of it. Afterwards, Hubbell failed, and defendant then refused to deliver the remaining 91 bags, and gave plaintiffs notice of his lien.

The facts in the case which plaintiffs claimed estopped defendant from enforcing his lien against them, and also the material portions of the judge's charge, are stated in the opinion.

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Brown & Calvin, for appellant.

I. When the plaintiffs purchased the rice, knowing it to be in defendant's possession, they took it with notice of defendant's rights, for its being in a cleaning mill, put them upon inquiry as to the nature of defendant's rights (*Sahler v. Signer*, 44 Barb. 606; *Bragg v. Boston, &c. R. R. Co.* 9 Allen, 54).

II. The defendant neither did nor said anything to estop him from insisting upon his lien as against the plaintiffs. It does not appear that he has done or omitted to do anything inconsistent with his present claim of lien, or that the plaintiffs have acted upon such doing or omission, or that the plaintiffs will be injured by allowing the facts alleged to be disproved, nor has the defendant stood by and voluntarily permitted Hubbell to sell the property as his, unincumbered, which are essential ingredients in estoppel (*Lawrence v. Brown*, 5 N. Y. 401; *Plumb v. Cattaraugus, &c. Ins. Co.* 18 Id. 392; *Manfs. and Traders' Bank v. Hazard*, 30 Id. 226). Admissions which come after the act do not go back and make an estoppel by relation (*Pike v. Acker*, Hill & Denio, 90). The farthest the court has gone upon this subject is to hold in *Brewster v. Baker* (16 Barb. 613), that where the owner of property is informed of its sale *on credit*, and permits the purchaser to pay therefor without giving him notice of his title, he is estopped; but in that case the real owner *received a part of the purchase price*. In this case, the defendant had no notice that the purchase was on credit, but was only informed plaintiffs *had purchased*, a thing *accomplished*, and the defendant had the right to assume it was purchased subject to his lien.

Edgar S. Van Winkle, for respondents, contended that there was no error in the judge's charge, and cited *Dezell v. Odell* (3 Hill, 221); *Carpenter v. Stilwell* (12 Barb. 135); *Cremin v. Byrnes* (4 E. D. Smith, 758); *Watson's Executors v. McLaren* (19 Wend. 557, 563); *Hibbard v. Stewart* (1 Hilt. 207).

BY THE COURT.*—ROBINSON, J.—At the time of the purchase

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

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by plaintiffs from Hubbell of the 301 bags of rice, of which the 91, the title to which is in question, constituted a part, they were in possession of the defendant, and were a portion of a cargo of rice delivered him by Hubbell, for the purpose of being cleaned, and were subject to his lien thereon for \$1,553 50, a balance due for cleaning the whole quantity.

The plaintiffs made the purchase September 13th, 1867, through Mr. O'Shaughnessy, a broker, for the aggregate price of \$5,950 34, of which they paid \$4,000 October 3d, and the balance about October 15th.

There was testimony to show that a Mr. Sorley, a clerk of O'Shaughnessy, informed defendant of plaintiffs' purchase, and that he (O'Shaughnessy) was going "to deliver it or take charge of it, or take charge of the delivery of it," and resell any of it "for them" if the broker could do so.

Mr. Sorley testified that two or three days after the sale he informed defendant of the purchase, and *went by direction of Hubbell* to see defendant, to find out about the insurance, so that it covered plaintiffs.

He also testified: "I gave the defendant notice of plaintiffs' purchase, a day or two after the purchase. I said to him, 'Messrs. James Graham & Co., of Philadelphia, have bought the balance of Hubbell's rice in your mill.' That is the substance. I don't know that he said anything."

He further testified he had *no notice of defendant's lien* until in November, some time after he had communicated the fact of the purchase.

Defendant testified he not only notified Mr. Sorley, the clerk of the broker, but O'Shaughnessy, the broker, himself, about a month before Hubbell failed, and before they had paid for the rice, not to pay for the rice; that he had a lien upon it; but in this he is also contradicted by O'Shaughnessy, who also testified he had never heard of any claim of defendant until after the sale, and about a month after Hubbell's failure, when notice was given by defendant in writing.

The evidence warranted the jury in finding the absence of any notice to plaintiffs that defendant claimed a lien on the rice in question, until about two months after the purchase, ex-

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cept such as the law might infer from the fact that it was or had been in his possession with knowledge of the broker and his clerk (who acted for plaintiffs) for the purposes of his business, the cleaning of the rice.

When notice of the purchase was given to the defendant, it does not appear that it was accompanied with any intimation that the purchase was incomplete, or upon any agreement or understanding that no provision was to be made for payment of his lien, or that no such lien existed.

No inquiry was made of him the answer to which reasonably would or was designed to influence plaintiffs' future action, nor does the evidence disclose any occasion when he was notified of any intended action, on the part of the plaintiffs, which would naturally be controlled or influenced by a disclosure of his claim upon the property. He was in no way negotiating with the plaintiffs, or having any dealings with them, nor was any inquiry made of him.

The defendant being in possession of the rice in question, as bailee, in the course of his business of cleaning it, as was known to plaintiffs, or their agent, they were bound to regard any rights of property, lien, or special interest he had in it, when attempting to deal with reference to it.

Possession of property constitutes notice to every one of the title of the possessor, and some very special circumstances must exist, in no way disclosed in this case, under or by virtue of which he can, without his consent, be deprived of his interest in it. His presence at the sale of the property to another, where he neither does or says anything to mislead the purchaser as to the character of his title or possession, in no way prejudices his rights (*Sahler v. Signer*, 44 Barb. 606; and to the same effect, *Bragg v. Boston, &c. R. R.* 9 Allen, 54; *Brown v. Bowen*, 30 N. Y. 519; *Manning v. Monaghan*, 28 Id. 585).

Estoppels are created between parties to a transaction from their failure to speak when good faith requires they should do so, or by giving misinformation as to matters which, from the nature of the transaction, tends to influence the conduct of the party with whom they are dealing. But third parties in some way connected with the subject of such dealings cannot

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be affected in their rights therein, unless apprised of the character of the intended action, of the materiality of the information sought, and unless they designedly give such misinformation as is acted upon to the prejudice of the inquirer (*Turner v. Coffin*, 12 Allen, 401; *Andrews v. Lyon*, 11 Id. 349; *Manfs. & Trad. B'k v. Hazard*, 30 N. Y. 226; *Plumb v. Cattaraugus, &c. B'k*, 18 Id. 392).

Misinformation which a person gives as to his rights, to a mere casual inquiry, will not protect, although subsequently acted upon in reliance upon its correctness (*Young v. Bushnell*, 8 Bosw. 1); nor if given to a party to a bargain after it has been concluded (*Walrath v. Redfield*, 18 N. Y. 457).

The judge before whom the cause was tried erred in disregarding these principles, and in charging that defendant was bound to make his lien known when the plaintiffs notified him that they had purchased; that when he had notice of sale to any person, he must give notice of his lien at the same time; and in refusing to charge that defendant's silence, when he was notified of plaintiffs' purchase, did not estop him from asserting his lien.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

PASQUALI BRIGNOLI v. CHICAGO AND GREAT EASTERN RAILWAY Co.

Where plaintiff proved that while riding as a passenger in one of the defendants' cars, the car in which he rode was, by reason of the breaking of one of the rails, overturned, in consequence of which his shoulder-blade was broken, and without imputation of negligence on his part, he sustained serious injury; *Held*, that he had made out a *prima facie* case of negligence on the part of the defendants, entitling him to damages.

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It having appeared on the trial that the accident by which the plaintiff was injured was caused directly by the breaking of a rail, but that the breaking of the rail was due to the unsound condition of a wooden cross-tie; *Held*, that the judge was right in refusing to charge the jury "that if the track and rails of the defendants (a railroad company) were sound immediately prior to the accident, and there was no defect in the rail which could have been discovered by any examination, the defendants were not responsible for the damage caused by the accident," on the ground that it tended to misdirect the minds of the jury from the real cause of the accident, which was the defect in the cross-tie.

In estimating the damages in such cases, personal suffering, as well as medical expenses and the direct pecuniary loss, are the subjects for compensation.

The jury may also take into account the probable profits of the engagements, or probable earnings of the plaintiff, after the time of the accident and during the disability arising therefrom.

APPEAL by defendants from a judgment of this court entered upon the verdict of a jury at trial term.

Action for negligence.

The facts are stated in the opinion.

Tompkins Westervelt, for appellants.

Edward Patterson, for respondent.

BY THE COURT.*—ROBINSON, J.—By the pleadings, the fact that the defendants were a railroad corporation, owning a railroad between Chicago, in the State of Illinois, and Cincinnati, in the State of Ohio, and common carriers for hire; and that plaintiff at the time of the accident complained of was a passenger in one of their cars, to be carried for hire between those cities, was admitted.

When the plaintiff first rested his case, it appeared that while such passenger was near Logansport, Indiana, the car in which he rode was, by reason of the breaking of one of the rails, overturned, in consequence of which his shoulder-blade was broken, and without imputation of negligence on his part, he sustained serious injury.

The circumstances under which the accident occurred, as

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disclosed by plaintiff's evidence when he first rested, and the fact that it arose from the car running off the track and upsetting, showed some such defect or deficiency in the road, or the machinery by which it was operated, as presented a *prima facie* case of negligence, entitling him to recover (*Holbrook v. Utica & Schenectady R. R. Co.* 12 N. Y. 236; *Curtis v. Rochester & Syracuse R. R. Co.* 18 Id. 534; *Edgerton v. N. Y. & Harlem R. R. Co.* 39 Id. 229).

The defendants had contracted to carry him safely, but failed to do so through a defect in their track. They were bound to have their track in a sound and safe condition, and as the accident happened from a failure in this respect, the burden of showing that it occurred without fault on their part was cast upon them, and this they attempted to do by endeavoring to prove, what the law exacted, that *their road was free from any defects which the utmost vigilance, aided by the highest skill, could discover or prevent.*

Upon this issue testimony was offered on both sides. The plaintiff subsequently offered considerable evidence tending to show positive neglect; and the question, as finally submitted, was one properly within the province of the jury, and has been passed upon by them.

The defendants' counsel requested the judge to charge the jury, that if the tracks and "rails of the defendants were sound immediately prior to the accident, and there was *no defect in the rail* which could have been discovered by any examination, the defendants were not responsible for the damage caused by the accident."

The judge said, "I leave that to the jury, as a question of fact."

Defendants' counsel then asked the judge to charge, that if they believed that state of facts, then the defendants were not responsible; to this the judge replied, "I decline to charge in that form. I leave it as a question of fact for the jury."

This was reiterated in substantially the same form, and on the judge declining to charge "that, in that form," exception was taken.

The evidence on the part of the plaintiff tended to show

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that the defect was not *in the rail* which broke, but in *the wooden cross-ties*, and these ingenious requests tended to misdirect the mind of the jury from the evidence, and were properly denied.

The defendants' counsel then stated eight several particulars in which they claimed to except to the judge's charge. As to the 1st, 2d, 4th, 6th, and 8th :

1st. That the defendants were responsible for all damages resulting from an accident where there was no *vis major*.

2d. That in this case there was no evidence of *vis major*.

4th. That the defendants had not proved anything in the nature of *vis major* in the case.

6th. That the jury were to take into consideration, in determining the damages, the mental anguish and suffering of the plaintiff.

8th. That the whole charge was a direction to the jury to find for the plaintiff.

Neither of these propositions is found in the charge.

3d. The third proposition is predicated upon the statement in the charge, that the circumstances proved, showing an injury resulting from a defect in the railroad or its appliances, presented *prima facie* evidence of neglect, is sustained by the authorities in our Court of Appeals above cited.

5th. That the jury were bound to allow plaintiff, on account of his damages, the full charge of Dr. Carnochan, of \$1,200.

This expense was incurred for medical attendance by Dr. Carnochan, in his necessary attendance to cure plaintiff of his injury, and no question was made that it was not necessary and proper. No suggestion is made why it should not be allowed as part of the plaintiff's damages. Personal suffering, as well as medical expenses, and the direct pecuniary loss, were the subjects for compensation (*Ransom v. N. Y. & Erie R. R. Co.* 15 N. Y. 415 ; *Morse v. Auburn & Syr. R. R. Co.* 10 Barb. 621 ; Sedg. on Dam. 648, note 2).

7th. The instruction to the jury, that in fixing the damages, they might take into account the probable profits of the engagements, or probable earnings of the plaintiff, after the time of the accident and during his disability therefrom. This, although

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not precisely in the terms of the charge, may be regarded as a substantial statement of its meaning and intent. In suits of this character there can be no certain measure of compensation for the pain and anguish of the body, injury to the health or person, nor for the loss of time and care of business.

The inquiry necessarily involves consideration of the position of the injured party in life, the business or profession in which he was engaged, the means at his command to earn money, and the extent to which they are affected in consequence of the injury (*Wade v. Leroy*, 20 How. U. S. 34; *Curtis v. Rochester & Syr. R. R. Co.* 20 Barb. 282; affirmed in 18 N. Y. 534).

This instruction to the jury was not erroneous, nor did any other error occur on the trial which entitles defendants to a new trial.

The judgment should be affirmed.

J. F. DALY, J., concurred.

DALY, CH. J. [dissenting.]—The judge was requested to charge that if the *track and rails* were sound immediately before the accident, and there was no defect in the rail which could have been discovered by any examination, the defendants were not responsible. This proposition was abstractly correct (*McPadden v. The N. Y. Central R. R. Co.* 44 N. Y. 478). It involved a proposition of law, and if at all relevant, could not be left to the jury to pass upon as a question of fact, which was the disposition the judge made of it.

It could not be deemed immaterial, if there was any testimony at all in the case upon which to predicate it, and there was, I think, such testimony. The rail-bed or track was examined by the defendants' witness Young, immediately before the accident and about two or three minutes after, and his statement was that there was nothing observable which could have caused the accident, and expressed his belief that the cause of the rail breaking could not have been detected by an examination before the passage of the train, and that there was no appearance of the rails having been displaced by reason of imperfect fastenings to cross-ties. The witness Reeve saw the broken rail within a

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minute after the accident, and said that there was nothing in its appearance to indicate the cause of its breaking. That he did not suppose the cause could have been detected by the examination of the rail before the passage of the train. That it was a new fracture, and the rail had the appearance of a sound rail in every respect except as to the fracture. That the ties and rails were all in their place, sound, and the whole in good condition, except the break in the rail. That he examined the track five minutes after the accident, and there was no appearance of the rail having been displaced by imperfect fastening to the cross-ties. The witness Harkness examined the track the next morning, and said that it was all in good condition, except the broken rail; that it was broken out of sound iron, and showed no defect whatever; that there was nothing to indicate the cause of its breaking; that there was no appearance of the rails having been displaced by imperfect fastening to the cross-ties, and that the cause of its breaking could not have been detected by an examination before the passage of the rail-car. Upon this testimony, and as the law is now expounded by the Court of Appeals in the case cited, it appears to me that the defendants were entitled to have the instruction they requested. The testimony was conflicting. That of the plaintiff was, that the cross-ties under the broken rail were entirely rotten, and probably furnished the true explanation of the cause of the breaking of the rail; but the defendants could not be deprived of the benefit of a proposition of law based upon the testimony given by their witnesses, that testimony being directly contradictory as to the actual state and condition of the ties. Lauza, for the plaintiff, swore that two or three of the ties to which the broken rail was attached, were all crumbled up like dust. Locabelle, that he examined the condition of the cross-ties, that they were bad and poor; that he scraped a cross-tie away with his foot, and that it all crumbled up; that the ties to which the rail was fastened were rotten; whilst Reeves, for the defendants, testified that the ties were all sound, in their place and the *whole* in good condition.

Judgment affirmed.

Dart v. Walker.

JAMES DART AND ANOTHER v. MARCUS WALKER AND ANDREW
McKINNEY.

A suit in this court, commenced in December, 1865, by a plaintiff resident in this State, against a defendant also then resident here, but who, before the final determination thereof became a resident of another State; *Held*, not removable to the United States Circuit Court, under the acts of Congress of July 27th, 1866, or of March 2d, 1867, defendant being a resident of this State at the time of the passage of those acts.

Where an application to remove a cause to the U. S. Circuit Court was founded upon the provisions of the act of 1867, *Held*, that, although the application must be denied under that act, still where the petition contained the necessary allegations the application might be granted under the act of 1866.

Under a joint petition by two defendants, the application may, under the act of 1866, be granted as to one defendant and denied as to the other.

Where a cause has been tried, but the judgment reversed on appeal and a new trial ordered, an application made before the new trial, is made "before trial or final hearing," within the meaning of the act.

APPEAL from an order made at special term. The facts are stated in the opinion.

BY THE COURT.*—ROBINSON, J.—This is an appeal from an order made on the application of both defendants for the removal of this action now at issue, and pending in this court, to the Circuit Court of the United States for the Southern District of this State. The application was made on the affidavits of both defendants that both plaintiffs are residents of this State; that they (the defendants) are both residents of the State of Massachusetts; that the matter in controversy is a claim for damages in the sum of \$30,000 (far exceeding \$500, exclusive of costs); that they both believe that from prejudice or local influence they and each of them will not be able to obtain justice in this court.

The application is also founded upon their joint petition for such removal of the cause, stating substantially the same facts as are contained in their affidavits, in which they jointly and severally offer the security required by the acts of Congress of March 2d, 1867, or that of 1866, to which it is amendatory.

The action was commenced in December, 1865, and issue

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

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was joined in March, 1866. The defendant Walker was at the time of the commencement of the suit a resident of this State, but for the past year and upwards has been a resident of Massachusetts, while the defendant McKinney, at the commencement of the action and ever since, has resided in Massachusetts. The cause has been once tried, but on appeal, a new trial has been ordered, and the case now stands for trial on the calendar of this court.

As to the defendant Walker, he cannot avail himself of the benefits of either of the acts of Congress of July 27th, 1866, or March 2d, 1867, above referred to.

At the time of the passage of both these acts, this suit had been already commenced and was then pending. It was not (as to him) one pending between "a citizen of the State in which the suit was brought against a citizen of another State," nor was it one that was "thereafter commenced," so that he did not come within either category of the statute.

His subsequent change of residence to the State of Massachusetts did not affect the exclusive jurisdiction of this court, nor authorize the removal of the cause to the Circuit Court of the United States.

The order denying the application in his behalf was correct, and should be affirmed. The motion was, however, granted as to the defendant McKinney, on condition that he file a bond in the penalty of \$20,000, with sureties, conditioned for the performance of the requirements of these acts. An objection is taken by the plaintiffs, on the ground that the application was made with express reference to the act of 1867, and that the defendant McKinney is not within the intent of that statute, because it had only reference to a suit between "a citizen of the State in which the suit is brought and a citizen of another State," that where all the plaintiffs are residents of one State, and all the defendants reside in another, and that no such relief as is sought can be afforded, because the application is made with reference to the act of 1867, and should not be granted under the act of 1866, because not asked for under that statute. Undoubtedly, the act of 1867 is to be construed in harmony with that received by the similar terms in the judiciary act of 1789,

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and has reference only to actions between one or more plaintiffs (of one class) and one or more defendants of the other class, in which the application for the removal of the cause should be made, either by all the plaintiffs, citizens of one State, or by all the defendants, who are citizens of another (*Fisk v. Chicago, Rock I. & P. R. R. Co.* 53 Barb. 472). The act of 1866, however, is one for the benefit of such of several defendants, citizens of a State other than that in which the suit is instituted, who make it appear to the satisfaction of the court, by petition, that the suit is one in which "*there can be a final determination of the controversy so far as the petitioning defendant is concerned, without the presence of the other defendants as parties in the cause.*"

The petition alleges, and by a statement of the nature of the action, discloses it to be one of this character, and although the rights of the petitioner, as stated, may be sought under and by erroneous reference to a particular statute, yet the appropriate relief may be granted, although afforded under a different act. It is further objected, on the part of the plaintiff, that the petition is joint, and being denied as to one defendant, should be as to both. The petition states the case of each defendant, and shows, as to McKinney, that he is within the provisions of the act of 1866, and that a removal may be made as to him, although refused as to Walker. They each offer to comply with the conditions of the statute, and the order allowing the application as to the defendant McKinney, on terms conforming to the act of 1866, could not have been properly denied.

By these statutes, application for the removal can be made "before trial or final hearing," and it is also urged that a trial having previously been had, the application is too late. This objection should not prevail. That trial was adjudged a *mis-trial*, and the case now stands for trial as if none such had occurred. A trial being the final determination of the merits of the controversy, such judicial consideration of the case must necessarily yet be had (*Akerly v. Vilas*, 8 Am. Law Reg. N. S. 229).

The order appealed from was, in all respects, proper, and should be affirmed, but without costs.

Judgment affirmed.

Smith v. Douglass.

WILLIAM E. SMITH v. BENJAMIN DOUGLASS AND ANOTHER.

The defendants, a firm, by a written agreement, contracted to employ the plaintiff as a clerk for the period of five years, the latter agreeing to act for them and their successors and assigns under their direction and control. Before the expiration of the five years, the defendants' firm dissolved, and was succeeded in business by a new firm, with which the plaintiff continued in service. *Held*, that in a suit upon the contract, for wages earned after the dissolution, and while the plaintiff was in the service of the new firm, it was not necessary to join as parties defendant the members of the new firm, who were not parties to the written agreement.

Defendants, by the contract, being at liberty to discharge the plaintiff upon ten days' notice, *Held*, that such right was absolute, and to be exercised at discretion, and the fact that a false reason was assigned, did not prevent them from afterwards relying on their right to discharge him at discretion.

APPEAL by defendants from a judgment of this court entered upon the report of a referee.

The facts are stated in the opinion.

C. A. Arthur, for appellants.

E. Bartlett, for respondent.

BY THE COURT.*—ROBINSON, J.—By the agreement between plaintiff and the defendants, upon which the first statement of a cause of action was founded, the defendants employed him as clerk in their mercantile agency establishment, for five years, from April 15th, 1857, at a salary increasing by \$100 a year, from \$600 to \$1,000, payable in equal monthly instalments; and he agreed so to act for them and *their successors and assigns*, under *their* direction and control in all things for that period. It was provided, that if defendants or their successors should become dissatisfied with him, they might discharge him from such employment at any time, on giving him ten days' notice. Defendants' firm dissolved July 1st, 1859, and were succeeded in the business by the firm of Dun, Boyd & Co., composed of the defendant Dun, Robert R. Boyd, and William

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

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Reilly, with whom plaintiff continued in such service until about September, 1859, when plaintiff was peremptorily, and without previous notice, discharged on an allegation of drunkenness and abuse of one of the senior partners. The referee finds the alleged cause for discharge was not true; that, on the contrary, "plaintiff was a remarkably temperate man," and there was no proof of his having abused one of the partners. The action for wages was properly brought on the express agreement of the defendants, notwithstanding a change of firm, or succession by others to the business, that they would pay the salary.

The referee has awarded \$500 damages to the plaintiff, exceeding a half year's salary, on account of his being dismissed for an alleged cause that was unsustained by proof, and not, as he finds, in the exercise of the power reserved in said agreement.

In this he erred. The power to dismiss *at discretion*, on giving ten days' notice, was absolute, and without the existence of any necessity for the defendants' assigning any cause; and, although they may have assigned one, as inducing their conduct, which was capricious and unfounded, their right to this act was none the less assured to them by the agreement (*Lynch v. Stone*, 4 Denio, 356).

It is not a case where the employee was discharged before the end of the term of hiring, upon a groundless cause being assigned, or where the employer is compelled to justify the discharge on grounds different from those first assigned; but one where the power of dismissal was expressly contemplated and reserved, upon the giving of notice for a definite time; and the only prejudice the plaintiff, under this contract, could have sustained by his peremptory dismissal, and without fault on his part, was in the loss arising from want of ten days' notice, and the measure of damages would ordinarily be the wages for a time equal to the agreed time of notice (1 Parsons on Cont. 526, and cases cited in note "t"; *Ridgway v. Hungerford Market Co.* 3 Ad. & El. 171; Story on Cont. 3 ed. § 962; *Hartly v. Harman*, 11 Ad. & El. 798).

If any additional damages could be allowed, no proof of

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any such as could be recovered for breach of duty to give the notice was offered; and the judgment of \$500 damages, for this cause, was clearly erroneous, and for that reason should be reversed, and a new trial granted.

The services he claims to have rendered for Mr. Douglass, as counsellor at law, and for which \$60 is awarded, clearly appear to have been personal to him, and without any such connection with the copartnership of Douglass & Dun as to entitle the plaintiff to any recovery therefor in this action.

Judgment reversed and new trial ordered, with costs to abide the event.

ZEB. F. WETZELL AND ANOTHER v. WILLIAM B. DINSMORE,
PRESIDENT OF ADAMS EXPRESS CO.

On the trial of an action against a common carrier for goods lost, the plaintiff put in evidence the carrier's receipt, which contained conditions restricting the carrier's common law liability; *Held*, that the plaintiff could not recover, except as according to the receipt, unless he showed that he had at the time of the shipment no notice of, and did not assent to, the conditions limiting the carrier's liability.

Where the receipt of a common carrier contained a clause limiting his liability to \$50 for "the article" forwarded, but the receipt was for "one package (3 cases Drugs);" *Held*, that the shipper could recover \$50 for each case lost.

APPEAL by defendants from a judgment entered on the decision of a judge at special term.

The facts are stated in the opinion.

On the trial the following opinion was delivered:

DALY, CH. J.—The complaint was against the defendants upon their common law liability. The defendants in their an-

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swer set up the receipt or bill of lading as the contract under which they agreed to transport the property. If the plaintiffs had proved orally the delivery of the goods to the defendants for carriage, I would be justified in finding that they took them subject to their extraordinary common law liability. But the proof which they introduced of the delivery and acceptance was the bill of lading, and as we held in *Lamb v. The Camden, &c. R. R. Co.* (2 Daly, 481), if the plaintiff relies upon the bill of lading as evidence of the contract to carry, he cannot adopt one part of it and reject the rest. If it is to be used at all as an instrument of evidence on his part, it must be taken altogether, and the contract collected from all that is contained in it. If offered by the carrier, on the contrary, as we held in the same case, it is ineffectual to prove a special contract, limiting his liability, unless the owner's assent is shown or can be assumed from the circumstances given in evidence in connection with it. In the one case, the writing or instrument is offered as the act of the defendant to charge him, and he is entitled to have the whole of it taken together (1 Greenleaf's Ev. 201). In the other case, the carrier introduces it as his own special act of acceptance, which of itself is not sufficient to show that the owner assented to, and was bound by, it.

Taking the bill of lading, then, as evidence of the contract, it has been held under a special clause, like the one contained in this, that the carrier is liable only to the extent of \$50 (*Newbergher v. Howard & Co.'s Express*, Legal Int. June, 1866; Redfield on Carriers, § 64); and the only remaining question is, whether the three cases which were bound together so as to form one package, are to be taken as separate articles, or unitedly as one article. The words of the contract are: "Fifty dollars, at which *the article* hereby forwarded is valued;" and the writing in the body of the receipt specifies what was received, as follows: "One pkge. (3 cases Drgs.), value not given." I think the receipt itself settles the question; and the plain meaning of it is, that there were three articles in one package; and such was the fact. There were three wooden boxes, each weighing forty pounds, which were strapped and cleated together in one package. Each was branded, "12 doz.

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Shallenberger's Fever and Ague Antidote;" and each marked with the plaintiffs' name and address, "St. Louis, Mo." So that if separated, each box being properly marked, could be separately carried and delivered, which event happened, for the defendants delivered only one of the cases. The other two were lost, or the defendants failed to deliver them.

The word *article*, as defined by lexicographers, is "a distinct portion or part, a joint or a part of member, one of various things," &c. It is a word of separation to individualize and distinguish some particular thing from the general thing or whole of which it forms a part, as an article in an agreement, an article of faith, an article of a newspaper, or an article of merchandise. It is derived from the Greek, the original or radical word meaning to join or to fit to as a part, and it is only very recently, as will be found by consulting the dictionaries (see Allison's American Dictionary, 1813; Worcester's Dictionary, ed. 1847), that it has been applied to denote such material or corporeal things as goods or physical property, and then only in the sense of something that is separate and individual in itself, as salt is a necessary article, or a hammer is a useful article.

In *Earle v. Cadmus* (2 Daly, 237), the defendant stipulated that he was not to be liable in the carriage of baggage for an amount exceeding fifty dollars *upon any article*. Here the word was properly used, and meant any article coming under the denomination of baggage; the law having to a large degree settled what articles, carried by a traveler, do or do not, come under the designation of baggage. In this case of *Earle v. Cadmus*, the plaintiff lost her trunk which she had entrusted to the defendant, an expressman, to carry, and he insisted that the word article in his stipulation applied to the trunk as a whole, and not to the articles contained in it, which separately estimated, amounted to \$355, no one article exceeding \$40 in value. But we held that this limitation applied to the articles in the trunk and not to the trunk collectively as one article. In the present case, the language used in the printed stipulation is "*The article forwarded,*" and was no doubt intended by the defendants, to cover all that was acknowledged as received

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by them for carriage, no matter of how many articles it might consist, for there is no end of the attempts of common carriers, especially since their right to make agreements limiting their liability has been fully conceded, to resort to all kinds of ingenious contrivances, particularly in the use of language, to escape from or diminish their responsibility in the event of loss. Indeed some of the printed stipulations which have been before us during the past two or three years, have been so comprehensively framed, as to make it difficult to imagine any conceivable case in which the carrier could be liable. The clause under consideration in this stipulation is, in my judgment, an attempt to give for the carrier's benefit, a meaning to a word not conformable to its etymology, and which it has never acquired in practical use.

The right of a common carrier to protect himself by notice that he will not be responsible for property beyond a certain value, unless the value is disclosed to him and an additional premium or charge paid to insure its safe carriage and delivery, is one which the law has always favored since the early cases of *Kenny v. Eggleston* (Aleyn, 93), *Tyley v. Morrice*, (Carthew, 485), being founded upon the plainest principles of justice, for he is not bound to take unusual risks, except upon an adequate compensation. But in availing himself of this right the carrier must act fairly. He is bound to apprise the one whose property is carried, plainly of what is required of him, and not couch his notice or stipulation in uncertain or ambiguous language, that he may by a certain construction of it escape responsibility in the event of loss. In *Butler v. Heane* (2 Campb. 415), where the carrier put up in his office a handbill, stating in large print the many advantages of his route, and then in very small characters at the bottom, that he would not be answerable for goods beyond the value of £5, it was held that he could not have the benefit of this stipulation. "If a common carrier," said Lord Ellenborough in that case, "is to be allowed to limit his responsibility, he must take care that every one who deals with him is fully informed of the limits to which he confines it," and this is as applicable to the language he employs in his notice or stipulation as it is to the way in which he prints or

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posts it up or delivers it as a notice. If the defendants in this case do not intend to be responsible for the safe carriage of any amount of property or goods beyond the value of fifty dollars, unless the value is disclosed to them, and an extra charge paid for its carriage, they should say so, and not disguise their intention in such language as "the article carried;" and if they do, the word "article" should be construed as applicable to anything to which it will apply in its ordinary, usual and etymological signification, and not with the sense they design to put upon it. In a certain sense of this word, there was but one article carried, as each box or case contained the same thing, a fever and ague remedy, but as property to be transported from one place to another, it was divided into three portable articles, each box being a separate thing, which was separately marked with the address and place of destination. From the manner in which they were strapped together, they formed one package, composed of three articles, and that the defendants themselves so regarded them, appears from the entry which they made in the bill of lading or receipt, of one package consisting of three cases of drugs.

There is no ground for the point taken by the plaintiffs in respect to the defendant's negligence, for there is some evidence of the manner of the loss of the two boxes, namely a probability that they were lost or destroyed at a fire which occurred in the defendant's office in Cincinnati.

The plaintiff is entitled to recover \$100, and interest.

Blatchford, Seward & Griswold, for appellants.

Enoch L. Fancher, for respondents.

By THE COURT.*—ROBINSON, J.—The contract of defendants (partly printed and partly written) as alleged in the answer, was produced on the trial by the plaintiffs and relied upon as the evidence of the defendants' obligation. No question, therefore, can arise upon any other responsibility than

* Present, ROBINSON, LARREMORE and J. F. DALY, JJ.

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what it imports, predicated upon the general liability of a common carrier and his common law obligation, without further proof that the receipt or contract, made or delivered on his part, was without notice to or assent by the owner to the special and limited obligations contained in *covert* conditions printed thereon and attempted to be affixed to the common law obligations of the carrier, without assent of the owner (*Lamb v. Camden, &c. R. R. Co.* 2 Daly, 481). The case is then dependent upon the construction to be given to the receipt given by defendants for "one package (3 cases drgs.)," as to which it was agreed that in no event should the holder of the receipt "demand beyond the sum of fifty dollars, at which *the article* forwarded is hereby valued, unless herein expressed."

In *Earle v. Cadmus* (2 Daly, 237) it was decided in this court, at general term, that the terms, "any article," in such a receipt referred to any separate article. In the present case, each case contained in the package of three cases, was of the actual value of \$113 50, two of which through the defendants' default were lost, and judgment has been given therefor at a valuation of \$50 each.

Were the case at general term of this court, above cited, not authoritative, the present case would require a like construction. The parties contracted with reference to a "package," which, as they yet expressed, consisted of *three cases*. They thus made reference to the particular subjects of their contract (*Woodruff v. Commercial M. Ins. Co.* 2 Hilt. 122), and had in contemplation the necessity of defining with particularity their meaning of the word "article," as constituting a designated part or member of the whole package. The effect of thus specifying the contents of the package, evidenced that their minds contemplated something beyond its general description, and for the purposes of the contract extended its operation to the particularly designated *articles* as "three cases," intended as distinguished from the term "package."

The reasons assigned by Chief Justice Daly for this decision should be accepted as satisfactory grounds for sustaining it.

The judgment should be accordingly affirmed, with costs.

Judgment affirmed.

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WILLIAM B. DINSMORE, PRESIDENT OF ADAMS EXPRESS CO. v.
WILLIAM B. DUNCAN AND OTHERS.

A United States treasury note issued under the act of Congress of March 3d, 1865 (13 U. S. Statutes at Large, 468), in which the name of the payee had not been filled in, was endorsed on the back by the owner, a national bank, as follows: "Pay to the Secretary of the Treasury for conversion. A. B., cashier." It was given to a common carrier to be transported to the treasury. While on the way, it was stolen from the common carrier, the endorsement on the back erased by the thief, and the note sold to a purchaser in good faith and for full value. *Held*, that the purchaser obtained a good title to the note.

Negotiable notes issued by the United States Government are subject to the common law rules applicable to commercial paper. Where in such a note no payee is named, it is payable to any *bona fide* holder, before maturity, who may insert his own name, or that of any other person, as payee.

EXCEPTIONS to a direction of the court at trial term, directing a verdict for plaintiffs, heard at general term. The facts are stated in the opinion.

W. W. Macfarland, for defendants.

I. The theory of plaintiffs' case is, that the note in question, according to the law merchant, bore, at the time it was stolen, a restrictive endorsement; that by one felony the note was taken from the plaintiffs' possession, and that by another felony or fraud the endorsement was removed; and that because of this restrictive endorsement, as they call it, the defendants obtained no title to the note. If this theory were true, it would not entitle the plaintiffs to recover, as will hereafter be shown; but it is not true. The essential fact, constituting the premise of the argument, has no existence. The note was never endorsed, in any sense in which that term is applicable to negotiable paper. The endorsement of negotiable paper imports a transfer by some person who has a right to endorse. There can be no endorsement, in this sense, except by the payee of the bill, who may be the payee originally nominated

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in the body of the instrument, or designated as such under an implied authority to fill a blank left for the purpose, or some person deriving title from such payee by regular and successive endorsements (2 Parsons on Bills, 1, 2 and 4; Smith's Mercantile Law, 215; 1 Am. Lead. Cases, 316, note 2; Chitty on Bills, pp. 140, 156; 14 Abbott's Pr. 278). The note in question was issued with implied authority to any *bona fide* holder to impose an obligation upon the Government in favor of himself, or any person nominated by him as the payee; but until the payee was thus nominated, the note contained a mere promise without a promisee, and in this condition was an imperfect instrument, imposing no obligation (1 Parsons on Bills, 33).

While the note remained in this imperfect condition it is obvious that no person could either restrict, or in any manner affect its negotiability by merely writing on the back of it a direction to the Secretary of the Treasury to do a certain thing with it. This writing by a person who sustained no legal relation to the note, performed no office whatever touching its negotiability. For such a purpose it was merely void. At most, the only effect it could have would be, perhaps, to give notice of a possible adverse equitable interest, had it remained upon the note. There was not, therefore, at any time any restrictive endorsement on the note in question, nor do the defendants claim title under or through any such endorsement. They claim to hold the note simply as *bona fide* purchasers thereof, and as the original and first payees ever nominated therein under the authority conferred by the maker. The bank did not at any time take the measure required by law to protect their title by a restrictive endorsement, and hence whatever legal effect might be due to that circumstance, had they done so, inasmuch as they did not do so, no argument can be predicated upon the fact of the existence at any time of a restrictive endorsement of the note in question. The mere fact that something was written upon the back of the note by a stranger to it, constituting no part of it, and of no consequence except as an ear-mark of ownership, which, had it remained there, might have led to inquiry as to their rights, is not suffi-



cient to enable the plaintiffs to maintain this action against the defendants (*Commonwealth v. Emigrant Industrial Savings Bank*, 98 Mass. 12). But, for the sake of the argument, assuming that the note did bear a restrictive endorsement, then we say:

II. This note, by the law under which it was issued, was made a part of the currency of the country, and is money in the same sense that a bank note is money (13 *U. S. Stat. at Large*, 280).

To *bona fide* holders of this class of paper, the law affords absolute protection against all defects of title, even such as may be detected by the exercise of ordinary diligence in the inspection of the paper; gross negligence on the part of the purchaser being of no consequence, except in so far as it may afford evidence of *mala fides*. Hence it is necessary that the holder of such a note as the one in question, who intends to restrict its negotiability by a restrictive endorsement, without which the note would continue to be negotiable, must, at his peril, see to it that his intention is so executed that all persons to whom it shall come shall, by an inspection of it, have notice of such intention. The case at bar must not be confounded with that class of cases where an obligation, or the indorsement of an obligation, is simulated or forged, and which, therefore, constitutes no real obligation, and no real endorsement, but a mere false token. Here the obligation is genuine and real, and the claim of the plaintiff rests merely upon a futile attempt to give notice of his title to it, and to control the manner of its performance. If the owner of such an instrument is deprived of his title by a felony, for example, a theft, or by the erasure of a writing in pencil, or of any other writing so done as to render its erasure possible, leaving the instrument in a perfect condition to pass as a valid instrument from hand to hand by delivery, whether such erasure be a felony or fraud, it is either his misfortune or his fault. Public policy imperatively requires that a *bona fide* holder should not be the sufferer (*Gould v. Segee*, 5 Duer, 260; *Hull v. Wilson*, 16 Barb. 548; *Wookey v. Pole*, 6 C. L. 327; *Birdsall v. Russell*, 29 N. Y. 220; *Belmont Branch Bank v. Hodge*, 35 Id. 65; *Raffael v. The Bank of England*, 17 Com. Bench, 161; *Goodman v. Hall*,

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4 Adol. & Ellis, 870; *Foster v. Pierson*, 1 C. M. & R. 849; *Goodman v. Simons*, 20 How. U. S.; *Steinhart v. Boker*, 34 Barb. 436; *Bank of Bengal v. Fagin*, 7 Moore P. C. 72; *Ingraham v. Primrose*, 97 C. L. 82; *Young v. Grote*, 4 Bing. 253).

III. It is submitted that there is another conclusive answer to this action, although of a radically different character. The action is brought by the Adams Express Company, who were carriers of the note in question, and in possession of it at the time of the robbery, and who have since acquired whatever title the bank had by a payment of the value thereof to the bank. It was doubtless the duty of the express company, at all hazards, to protect the note in question, and to deliver it safely, and to this end to exercise the necessary degree of care and diligence, however great that might be. In recognition of this liability, the company paid to the bank the value of the note. Hence it follows, that the proximate cause of the loss of this note was the failure on the part of the plaintiffs to perform a duty which they owed, and which the law imposed upon them in respect to this note, viz., to protect it from loss by robbery, at all events, and at any expense of care and diligence necessary for this purpose. Having failed to perform this duty, and having lost the note in consequence of that failure, they cannot recover it or its value. A failure to perform a duty, however onerous it may be, is negligence, and every person must bear the consequence of his own negligence, from which no right of action can spring, especially against one who, in case of success, would be made the victim of that negligence. Hence the rule that where one of two innocent persons is to suffer from the fraud of a third, he who has enabled such third person to commit the fraud must bear the loss (*Phillips v. Thurn*, Law. Rep. 1 C. P. 472; *Young v. Grote*, 13 C. L. 420; *Lickbarrow v. Mason*, 2 T. R. 70; *Fatman v. Lobach*, 1 Duer, 354; *Bank of Buffalo v. Kortwright*, 22 Wend. 348; *Putnam v. Sullivan*, 4 Mass. 45; *MacDonald v. Muscatine Nat. Bank*, 27 Iowa, 319).

This rule is strikingly illustrated by the case of *Sturge v. Starr*, 2 M. Y. & K. 195.

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Clarence A. Seward & Charles M. Da Costa, for plaintiffs.

The primary inquiry is as to the effect of the endorsement by the bank, prior to the delivery of the note to the plaintiff's company for transportation. (1). It was a prudential act; and the law favors acts of prudence. The bank was about to part with the physical possession of the note, and it undertook to guard itself against loss while the note was *en route* from the bank to the Treasury Department. (2). Such endorsement was proper in itself, and was intended to subserve a useful purpose. (3). It was intended to evidence the individual proprietorship of the bank in the note so endorsed, and thus to prevent the acquisition of title by a stranger. (4). It was expressed in the only language known to the law, by which such proprietorship could be asserted. (5). Such expression was in the precise form which has been sanctioned by the law since credit became negotiable. (6). It reduced the general promise contained in the body of the note, to pay to ————, or bearer, to an individual promise to pay to the bank, and to it alone. (7). It converted the single obligation of the promiser, and with its assent, from a promise to pay in money, into a contract to exchange for bonds; and such contract could not be legally interpreted as against either one or the other of the parties thereto, without reference to the statute under and by which such contract was authorized. (8). It relinquished the right of the owner to demand payment in money, and substituted therefor his contract to accept, under the statute in lieu of money, further evidences of indebtedness on the part of the Government. (9). It transferred to the United States the property in the note, by making it the payee thereof; and reposed simply upon the statute and the faith of the Government, for the insurance and delivery of the bonds (*United States v. Barker*, 1 Paine C. C. R. 156; *Dugan v. The United States*, 3 Wheat. 172). (10). It transformed the contract from the obligation of the Government to pay, into a mutual contract: (a). To issue bonds in payment. (b). To receive such bonds as payment. (11). It terminated the contract to pay in money, and therefore, demonetized the instrument, and converted it

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into a simple paid up subscription to another and further Government loan (*Rex v. Reeves*, 2 Leach C. C. R. 808, 816). Such subscription was not transferable save with the assent of the subscriber. (12.) It converted an individual promise on the part of the Government into a mutual contract, which mutual contract became by the fact of its mutuality, a *chose in action*, not negotiable, and transferable by assignment only; and until such assignment was made, the title to the thing into which the note so endorsed was to be converted, remained in the bank. (13.) If the mutual promise was not negotiable, title therein could not be passed as against the bank, by a forgery. The analogy between the mutual promise created by the endorsement of the note, and the statute which sanctioned its conversion into bonds, and a certificate of stock in a corporate company, is precise and complete. Under a forged transfer of stock, neither the corporation, nor a *bona fide* purchaser for value, can be protected. This was decided in the case of *Davis v. The Bank of England* (2 Bing. 393), where the bank was held liable to refund past dividends and the value of the stock which it had permitted to be paid and transferred under a forged power of attorney. The same principle was enunciated also *In re The Bahia and San Francisco Railway Co.* (L. R. 3 Q. B. 584), and in *Johnston v. Renton* (L. R. 9 Eq. Cas. 981). It was further affirmed by the House of Lords in the case of *Marsh v. Keating* (1 Bing. N. C. 197), which sustained an action in favor of a stockholder whose stock had been sold without his knowledge under a forged power of attorney, for money had and received against the party who held the proceeds of the sale. See also *Taylor v. Midland Co.* (28 Beavan, 287). (14.) The note so endorsed became a *chose in action* (*Rex v. Capper*, 5 Price, 217); and had no further negotiability save for the purpose of redemption by conversion, and it could not thereafter be considered as money (*Nightingale v. Devisme*, 2 Wm. Black. 684); and it thereafter amounted in judgment of law to nothing but a right to receive the bonds. This was further decided in the case of *Wildman v. Wildman* (9 Ves. 173), in which the court said, that the circumstance that the Government was the debtor, made no difference; and that

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the mere right to receive that which was promised by the Government had no resemblance to chattels movable or to coined money capable of manual apprehension.

BY THE COURT.*—ROBINSON, J.—This action is brought for the alleged conversion of a seven-thirty note of the United States, issued under the act of Congress of March 3, 1865 (13 U. S. Statutes at Large, 468), which, when held by the First National Bank of New Albany, Indiana, under whom plaintiffs assert title, was substantially in this form :

“\$1,000. Three years after date
The United States promise to pay to the order of
One thousand dollars, with interest at $7\frac{3}{10}$ per cent., payable semi-annually in lawful money.”

(Signed by the proper officers of the Treasury.)

It was, on the 22d of May, 1868, entrusted by that bank to plaintiffs (common carriers), for remittance to Washington for conversion into five-twenty bonds, as allowed by that act, being endorsed by the cashier, “Pay to the bearer (printed), Secretary of the Treasury, for conversion. W. MANN, Cash.” The package containing this note, in course of transportation, was, on the night of May 22d, 1868, stolen from the plaintiffs and taken to Liverpool, England, where, on the 25th day of June, 1868, the endorsement having been obliterated or extracted by some chemical process, so that it could not be observed, it was, in good faith and for full value, purchased by the firm of L. Bemas & Sons, bankers, who, on the 26th, remitted it to the defendants, bankers, and their correspondents in New York, for conversion. The defendants sent the full value of the note to Bemas & Sons, on July 8, 1868, without notice affecting the validity of their title, and they subsequently converted it by accepting substituted security, in conformity to the provisions of the act of 1865.

The note, although issued by the United States Government, was subject to the common law rule applicable to commercial paper (*Murray v. Lardner*, 2 Wall. 118; *Thompson v. Lee*, 3 Ib. 327; *Texas v. White*, 7 Ib. 700). As issued, no payee being

* Present, DALY, Ch. J., ROBINSON, and LARREMORE, JJ.

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named, it was payable to any *bona fide* holder before maturity. The payee's name being in blank, he could insert his own name or that of any other person (*Cruchley v. Clarence*, 2 M. & S. 90). But until such restriction was placed upon the negotiability of the instrument, it continued an obligation through the law merchant, payable to any one who, in good faith and before maturity, became its holder. Endorsements or other minutes on its back or otherwise, so long as they continued apparent, operated at most by way of notice or of guaranty, but otherwise in no way interfered with the negotiability of the instrument, which, until its restriction by the insertion of the name of a payee, continued payable to bearer (*Birdsall v. Russell*, 29 N.Y. 227). Defendant's title to the note was in no way acquired through any endorsement of the First National Bank of New Albany, and was in no way affected by any obliteration or forgery of the endorsement made by W. Mann, their cashier.

For these reasons judgment should be given in defendants' favor.

Judgment for defendants.

Grube v. Schultheiss.

HENRY GRUBE v. JOHN F. SCHULTHEISS AND OTHERS.

Where work is to be done "agreeably to the plans and specifications prepared for the same by A. and B., the architects, and also according to directions and the entire satisfaction of the said architects," the approval of the work by the architects—in the absence of fraud—is decisive as between the parties.

Where testimony has been offered on both sides of a question, the decision of a referee, like the verdict of a jury, ought to be disturbed only where some error of law has been committed on the trial, or where there is gross error in the findings of fact, showing prejudice or misconduct, or where it is against testimony intrinsically overwhelming.

APPEAL by defendants from a judgment of this court entered on the report of a referee.

The facts are stated in the opinion.

J. H. Cornell, for appellants.

Sackett, Webster & Sackett, for respondent.

BY THE COURT.*—ROBINSON, J.—The main question of fact presented in this case was, whether the plaintiff built the hall at Jones' Woods, referred to in the contract between him and the defendants, Schultheiss & Bohnet, "agreeably to the plans and specifications prepared for the same by Schultz & Schoen, architects, and also according to directions, and the entire satisfaction of said architects."

That he did so to the satisfaction of these architects was best shown by their positive testimony; and that the work conformed to the contract was also shown by the testimony of other witnesses, though controverted by witnesses produced on the part of the defendants. The latter issue was determined by the referee upon these conflicting proofs.

On examination of the voluminous case, no error of law

* Present, DALY, Ch. J., ROBINSON and J. F. DALY, JJ.

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appears to have been committed, nor is any suggested in defendants' points; and as to the questions of fact, there was no such preponderance of proof in favor of the defendants as shows injustice was done them in the determination of the referee.

It might have been well urged that, under the terms of the contract, the architects were to act as judges or arbitrators, and that in the absence of fraud (which was not shown or scarcely suggested) their approval of the work was decisive as between the parties (*Butler v. Tucker*, 24 Wend. 447; *Wyckoff v. Meyers*, 44 N. Y. 143). Defendants were, however, allowed to present the issue of fact before the referee, uncontrolled by the architects' mere approval, and it has been decided against them upon conflicting proofs.

There was also the extra work done, the amount and value of which has been found by the referee upon the evidence offered before him. Some delay occurred in the completion of the contract work beyond the specified time; but the referee finds, on conflicting proofs, that such delay was occasioned by the alterations and *extra* work, and by other delay caused by the defendants, Schultheiss & Bohnet.

The proofs fully warrant such findings, and the decision of the referee, like the verdict of a jury, where testimony has been offered on both sides of a question, ought only to be disturbed, where some error of law has been committed on the trial, or where there is gross error in the findings of fact, showing prejudice or misconduct, or where the decision is against testimony intrinsically overwhelming.

Nothing of this character appears in the present case, and the judgment should be affirmed, with costs.

Judgment affirmed.

Hallahan v. Herbert.

MICHAEL HALLAHAN v. DANIEL HERBERT AND OTHERS.

The owner of certain lots in the city of New York agreed to sell them and make advances to the purchasers to enable them to build, and upon the completion of the buildings, to deliver a deed. The purchasers contracted with plaintiff's assignor to furnish certain materials for the building, and on account of the materials thus furnished a mechanic's lien was filed against the owner of the lots. *Held*, it could not be enforced.

The act of 1868 (Laws of 1868, ch. 500), in regard to mechanics' liens in New York city, which provides for a discharge of the lien effected under that act by an entry on the judgment docket, by order of the court, that the judgment rendered in a proceeding to enforce the lien has been "secured on appeal," does not interfere with liens acquired under the provisions of previous acts (acts of 1851 and of 1855), or authorize their discharge upon the terms or in the manner provided as to those acquired under the act of 1868.

Nor is there any provision of the Code of Procedure by which such a judgment can be marked "secured on appeal," with any such effect as to discharge the lien or security upon the property. The most that the granting of an order to that effect could do would be to stay the enforcement of the personal judgment.

In a proceeding to enforce a mechanic's lien, a defense that the lien has been released or removed must be pleaded, or it cannot be proved.

A person entitled to file a lien may assign his claim and afterwards file a lien or do any similar act in aid of the claim, or if he neglects to do so, his assignee may do it in his name.

Even if this were not allowable, the objection cannot be raised by the introduction of evidence in a proceeding to enforce the lien, commenced by the original claimant and lienor, in which the answer does not take issue on that point, and in which the assignee of the claim is substituted as plaintiff by an order of the court.

Where the owner appears and denies the debt, under § 8 of the act of 1851, a personal judgment may be rendered against the owner and contracting party, which may be enforced by execution, as in other actions.

APPEAL by defendants from a judgment of this court in a proceeding to foreclose a mechanic's lien.

The proceeding was commenced January 7th, 1864, by service of notice on the defendants to appear and submit to an accounting.

Defendants demurred to the complaint, but their demurrer

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was overruled at special term, and they appealed to the court at general term. After taking the appeal, they procured an order that on their giving a bond with sureties, &c., "an entry be made by the county clerk on the docket of mechanics' liens, and on the docket of such judgment and decree, *secured on appeal*," and in obedience to such order, such entry was duly made by the clerk.

The demurrer was sustained by the general term, and upon the plaintiff amending his complaint, and an answer being put in by the defendants, the issues were referred to a referee, who reported in favor of plaintiff; that the equitable interest of Daniel Herbert, Elias Herbert and William S. Ford in the property covered by the lien should be sold, and also for a personal judgment against the said defendants.

William Weston, for appellants.

William McDermott, for respondent.

BY THE COURT.*—ROBINSON, J.—The facts of this case are substantially as follows: The defendants, Daniel and Elias Herbert, and William S. Ford, composing the firm of D. and E. Herbert & Co., in 1860, made a verbal contract with the defendant Cudlipp, to purchase from him twenty-eight lots on the northerly side of 69th street, in the city of New York, commencing at 10th avenue, and extending about 650 feet westerly, and to erect sixteen houses thereon, Cudlipp agreeing to advance money towards the erection of the houses, and when they were built, the purchasers were to take deeds and give back mortgages for the price of the land and the advances. They proceeded with the work, and on the 23d of December, 1861, the houses being all inclosed, Cudlipp and Graff and their wives conveyed the lots to Daniel Herbert, who, at the same time, executed to his grantors two mortgages on the property, one for \$10,000 and one for \$31,900. Subsequently, Daniel Herbert and wife, by deed dated the 12th of February, 1862, con-

* Present, DALY, CH. J., and ROBINSON, J.

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veyed to Cudlipp the same twenty-eight lots, subject to all incumbrances.

Cudlipp, together with his wife, subsequently, by deed dated March 7th, 1863, reconveyed to Herbert twenty-four of the same lots, who at the same time executed to Cudlipp a mortgage thereon for \$23,500. It was agreed on the trial that *these several deeds and mortgages were executed in pursuance of the original verbal agreement between Cudlipp and Herbert & Co.* The reconveyance to Cudlipp, dated February 12th, 1862, was upon a consideration then received from him. In May, 1862, D. and E. Herbert & Co. contracted with Jacob Demarest for the furnishing of the blue stone for the sixteen houses under written contract, by which it was provided that if he delayed in fulfilling his contract, Herbert & Co. might proceed with the same, and charge the expense to him. In August, 1862, he became insolvent, and left the work incomplete, and plaintiff, his assignee, and Herbert & Co. supplied what was required, and on an accounting and settlement, which shortly afterwards took place between them (the only parties then interested), \$960 67 was found due for the work performed under this contract.

In November, 1862, Demarest filed a mechanic's lien on these sixteen buildings for this work, claiming \$795 to be still due him, in which Cudlipp was alleged to be *owner*. On the 23d of January, 1863, he filed another notice of lien in the county clerk's office, claiming \$990 to be due him on this contract with Herbert & Co. and that they were the *equitable owners* under a written contract of sale made by them with Cudlipp, the *legal owner*. This latter is the lien attempted to be foreclosed in this action. The evidence shows the claim of Demarest as attempted to be asserted under these several liens, had been assigned to the plaintiff, and there was proof of some such transfer before November, 1862, but the formal assignment was dated January 23d, 1863. The first lien was radically defective in attempting to assert rights against the title of Cudlipp, as owner, under an alleged contract with Herbert & Co. as "contracting builders" (*Beals v. Congregation B'nai Jeshurun*, 1 E. D. Smith, 654).

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Cudlipp, the owner of the legal title, having agreed to sell the lots, and also to make the loan to enable the purchasers to build, the buildings were not erected for him, but for the purchasers, who were the equitable owners, and were engaged in erecting the buildings on their own account. They contracted with Demarest on their own behalf, and it was only against their interest in the premises that the lien could be asserted (*Loonie v. Hogan*, 9 N. Y. 435; *Walker v. Paine*, 2 E. D. Smith, 662; *McMahon v. Tenth Ward School Officers*, 12 Abb. Pr. 129). The mortgage of Herbert to Cudlipp for \$23,500, above referred to, was foreclosed in an action in which Daniel Herbert (the mortgagee) and wife and William S. Ford were defendants, and by a judgment therein, dated January 19th, 1864, the premises were sold, February 12th, 1864, to Robert J. Brown, but neither the plaintiff nor Demarest were made parties to the proceedings, nor was the lien that had been created by the notice, filed January 23d, 1863, upon the interest which Daniel Herbert had in the land on which the buildings were erected, whether legal or equitable, affected thereby. Although the interest of D. & E. Herbert and Ford in the land was merely equitable and subject to such proceedings at law as operated to extinguish it, yet being one patent and matter of record, so long as it subsisted, the creditor holding the lien was entitled to notice of and to be made a party to any proceeding instituted for its foreclosure or extinguishment.

By statute his lien continued "until the expiration of one year from the creation thereof and *until judgment rendered in any proceeding for the enforcement thereof*" (Laws of 1851, ch. 513, § 12).

These proceedings for the foreclosure of the lien as against the owner and subsequent parties in interest were commenced within the year, to wit, January 14th, 1864, and have ever since been pending.

Neither the act of 1851 nor the amendatory act of 1855 (Laws of 1855, ch. 404, p. 760) afford any way of relieving or discharging the lien created by the filing of the notice as provided for by the former act, except in the manner provided by § 11 of the act of 1851 (ch. 513): 1st. By satisfaction; 2d.

A deposit of the amount claimed with the clerk ; 3d. An entry by the clerk, after the lapse of one year, that no notice had been given him to enforce the lien ; 4th. Proof of default of claimant on notice by owners to commence action for the enforcement of the lien ; and, 5th. By its satisfaction after action brought for its enforcement.

The act of 1863 (ch. 500), which took effect July 1st, 1863, (§ 15), repealed (§ 12) the acts above referred to, except so far as might be necessary to carry into effect liens acquired before that act took effect, and to allow persons thereafter performing work or furnishing work prior to July 1st, 1863, to acquire a lien pursuant to the provisions of that act.

This lien had been acquired under the act of 1851 and its amendment of 1855, under which both the right and the remedy had then been perfected, so far as could be afforded by those acts.

It was within the province of the Legislature to alter the remedy for the enforcement of the right, but not to affect its validity or efficacy as created by existing laws by authorizing any substituted security (*Bronson v. Kinzie*, 1 How. U. S. 311; *Howard v. Bugbee*, 24 Id. 461).

The provision in the subsequent act of 1863 authorized a discharge of the lien effected under that act by an entry (on the judgment docket) by order of the court, that the judgment [on a proceeding to enforce it] had been "secured on appeal," but it did not, in terms or in effect, otherwise interfere with liens acquired under previous statutes, or authorize their discharge upon the terms or in the manner provided as to those that might subsequently be acquired under that act. This action being one *in rem*, the Code did not provide for any release of the primary lien of the debt, upon a judgment for its enforcement, or authorize the marking of a judgment directing a sale of the property as "secured on appeal," with any such effect as to *discharge the lien or security upon the property*. The granting of an order to that effect could, at most, operate as a stay of the personal judgment (*Rathbone v. Morris*, 9 Abb. Pr. 213; Code, § 339). The answer does not, by way of defense, allege any release or removal of the lien through that

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proceeding, nor can any be claimed (when not alleged) through the desultory proof that an order was granted, directing the docket to be marked "secured on appeal."

Notwithstanding the order in this cause, made August 30th, 1864, substituting the plaintiff Hallahan, as assignee of the claim in suit, instead of Demarest, the person performing the work, it is claimed that as Demarest had, prior to the filing of this lien, assigned the claim to plaintiff, the defendants are entitled to maintain the invalidity of the lien, because the debt upon which it was predicated, having been assigned by the party, did not belong to him, and no such right of lien belonged to him.

No such fact was presented or objection taken for the consideration of the court when it decided that the plaintiff, as assignee, ought properly to be substituted in this action as plaintiff, instead of Demarest, the original creditor. Upon such interlocutory decision, the matter presented for adjudication, under § 121 of the Code, was definite and certain, and was to be determined upon the evidence then presented, and if erroneously decided, was the subject of immediate appeal, as affecting a substantial right. It was not, however, permissible for the defendants, on the trial, to introduce proof tending to show that decision was wrong, nor on appeal, upon any such evidence, to base the right (under § 329 of the Code) to review the merits of that order. The answer does not, in terms, assert the invalidity of that order, but simply alleges that the affidavit on which the order was granted did not state the date of Demarest's death, and of his having made the assignment of the claim prior to the filing of any notice of lien, nor defendant's ignorance of any such facts. Any misapprehension or ignorance may have furnished ground for a reconsideration of the motion; but that was never applied for, and as it affected a substantial right, and remained unreversed, it is "*res adjudicata*," upon the matter so decided, precluding subsequent inquiry or controversy on the trial as facts on which it was predicated. There is, however, no merit in the objection. Even if such a lienor had assigned his claim, he was justified, notwithstanding the assignment, in doing any such act in aid of the claim as the law accorded to it,

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and if he neglected so to act, his assignee, as his attorney or agent, might execute or perform *in his name* whatever, by law, was permitted him to do, for the security or enforcement of the demand (1 Ch. Pl. 16). What was done in the present case, after any such alleged assignment of the debt, was by way of assurance of the title to it, or in perfecting and making available the collateral securities appertaining to it, and although *pro forma* in his name (not being allowed in the name of the assignee), was strictly in accordance with the rights of the parties, and in no way compromised or prejudiced the debtor, or any one claiming under him. Such transfer of interest cannot be construed into any release or abandonment of the rights of the creditor, nor of any right of lien incident to or attached to the debt. The act of 1851, in terms, provided that the "contractor, laborer, or person furnishing material, should enforce or bring to a close such lien by serving, or causing to be served, personally on such owner," &c., a notice to appear and submit to an accounting and settlement of the amount claimed to be due. The right of the assignee to file such lien in his own name was denied in *Roberts v. Fowler* (3 E. D. Smith, 632); but what was done in this case was by, and in the name of, the original contractor, in accordance with the provisions of the act. The Code (§ 111), requiring *suits* to be prosecuted in the name *of the real party in interest*, had no application to these proceedings previous to the service of notice to foreclose the lien, and it was only after such jurisdiction had been acquired, and they had become a suit in this court, that the orders of the court became operative upon the rights of the parties. The objection that the right of lien incident to this debt, in the name of Demarest the contractor, was lost by reason of his assignment of the debt previous to the filing of the notice of lien, for these reasons, should not prevail.

The last point is, that the separate judgment against the equitable owners (D. & E. Herbert & Co.), with whom the contract was made, for the amount due upon it, could not be made in this action. A determination of the amount due from the owner to the contractor was necessary in the action, and where, as in this case, the owner appeared (by § 8 of the act of 1851,

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ch. 513), and answered denying the debt, the issue was to be "tried and judgment thereon enforced in all respects, and in the same manner as upon issues joined and judgment rendered in civil actions for the recovery of money in said court." This authorized a personal judgment against the owner and contracting party, and its enforcement by execution as in other actions.

The judgment is to the effect that the lien existed only on the 16 buildings and appurtenances, and the lots upon which the same stood, to the extent of such (equitable) interest as D. & E. Herbert & Co. had therein on the 23d of January, 1863, and there is no error in this respect, as is claimed in defendant's points, intimating that it ordered the sale of either 28 or 24 lots.

The judgment should be affirmed, with costs.

Judgment affirmed.

FRANCIS C. UPTON AND JOSEPH H. TITUS v. EDWARD A.
BEDLOW.

In an action on an account stated, which had been signed by defendant and acknowledged to be correct, the answer set up that the defendant had been induced to sign the account by the misrepresentations of the plaintiffs, and that the account was not correct. On the trial, one of the plaintiffs was subpoenaed to produce the firm books containing the account, but failed to do so, and stated that they were lost. Defendant's counsel then swore that on an examination before trial, when the books were produced, one of the plaintiffs had given evidence which contradicted the account sued upon. *Held*, that this was sufficient evidence on the subject of misrepresentation in obtaining defendant's acknowledgement of the account to entitle him to have it submitted to the jury.

APPEAL by defendant from a judgment of this court entered on the verdict of a jury, found by direction of the court at trial term.

The action was on an account stated by plaintiffs, who were stock brokers, under the firm name of Upton & Titus, and who had bought stocks and advanced money to defendant. This

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account had been signed and acknowledged to be correct by defendant. In defense, it was set up that defendant had been induced to do so by the misrepresentations of plaintiffs, and that the account was not correct. On the trial, defendant subpoenaed the plaintiff Upton, to produce the books of Upton & Titus, which contained the account in question. Plaintiffs did not produce them, and alleged they were lost, and could not be found.

Mr. Watson, counsel for defendant, then swore that on an examination before trial, the plaintiff Titus had sworn to facts which contradicted the account. These facts defendant demanded should be submitted to the jury as evidence of misrepresentation and of the falsity of the account.

This was refused, and defendant excepted.

William Watson, for appellant.

Chas. B. Stoughton, for respondents.

BY THE COURT.*—JOSEPH F. DALY, J.—It seems, upon reading the evidence in the case, that there was ground for the defendant's request to submit the question of misrepresentation to the jury. The disappearance of plaintiffs' books, from which alone the truth or falsity of the plaintiffs' representations as to the account presented to and signed by defendant could be shown, was a suspicious circumstance. The books belonged to plaintiffs, were brought to court by them, on the examination before trial, were not delivered into the custody of the court, and should have been most carefully guarded by the plaintiffs. The evidence of Mr. Watson was uncontradicted as to what the plaintiff Titus swore on preliminary examination his books showed, and that statement of Titus contradicted the account. Whatever inferences were to be drawn from these facts might be drawn by the court, unless the defendant required the jury to do it. He did make the request, and the court should have left it to the jury (*Lockwood v. Thorne*, 18 N. Y. 291).

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ.

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Under the ruling in *Markham v. Jaudon* (41 N. Y. 235), the plaintiffs could not sell the defendant's stock without giving him notice. They did sell it without notice, and were liable to him for a conversion. If the agreement signed by the defendant at the foot of the account or settlement, be urged as a settlement or waiver of the claim he then had for such conversion, it was without consideration.

It seems to me that the judgment should be reversed, and a new trial ordered.

LARREMORE, J.—I think the questions involved in this case should have been submitted to the jury.

DALY, CH. J.—I am of the same opinion.

Judgment reversed.

DAVID N. DAVIS v. JOHN A. GWYNNE AND OTHERS.

Defendants were stock brokers, carrying certain stock for plaintiff, who, on September 12th, 1867, wrote to them, directing that in case the stock should look like reaction or weaken, or have a downward look, they should sell for him 50 or 100 shares, as the case might look. On September 14th, the defendants replied that they thought the market would recover from its present depression. On September 17th, the plaintiff ordered the defendants to purchase 100 shares, if the stock looked like rising. On the 18th, the defendants bought for the plaintiff 50 shares, and on the 20th, the market falling rapidly, they sold all the plaintiff's stock, without notice to him. *Held*, that the direction contained in the plaintiff's letter of the 12th was not revoked by what subsequently took place, and the defendants were justified in selling upon the fall in the market.

APPEAL by plaintiff from a judgment of this court, entered upon the direction of a judge at trial term, dismissing the complaint.

William Stanly, for appellant.

John E. Burrill, for respondents.

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BY THE COURT.*—JOSEPH F. DALY, J.—The defendants, who were brokers in this city, acting as agents for the plaintiff in buying and selling stocks, had in their possession as such agents and brokers, on September 20th, 1867, one hundred shares of the capital stock of the Chicago & North Western R. R. Co., which they had purchased by order of the plaintiff. On that day they sold all the 100 shares, leaving in their hands, to the credit of the plaintiff, \$17 20 of the margins originally deposited by him with them. The plaintiff claims that such sale was unauthorized, and made without notice of the time and place of sale. If such sale were unauthorized, the plaintiff would be entitled to a verdict upon the authority of *Markham v. Jaudon* (41 N. Y. 235). In any event, he was entitled to a verdict for \$17 20 and interest from the commencement of the action, January 31st, 1870.

The defendants rely upon letters of the plaintiff as their authority for the sale. The correspondence is as follows:

On September 12th, 1867, the plaintiff wrote to defendants that, should North West look like reaction or weaken, or have a downward look, to sell him fifty or one hundred shares, as the case may look. (The defendants then held but fifty shares for him.)

On September 14th, 1867, the defendants replied that they thought the market would recover from present depression.

About September 17th (that day or before), the plaintiff ordered defendants to purchase one hundred shares, if the stock looked like rising.

On September 17th, defendants replied that they did not buy the one hundred shares, as they were then carrying fifty shares for plaintiff's account, and if they bought one hundred more, they would only have three *per cent.* margin on the one hundred and fifty shares, which they thought rather small, as plaintiff did not say anything about sending them more; also, that if he sent them more margin, they thought the stock good to buy; that North West was then 43 $\frac{1}{2}$, and Preferred, 69.

* Present, LARREMORE and J. F. DALY, JJ.

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On September 18th, 1867, defendants telegraphed to plaintiff that they had bought fifty common, at $43\frac{1}{2}$.

On September 20th, 1867, defendants telegraphed to plaintiff that they had sold one hundred common, at $39\frac{1}{4}$; and wrote to plaintiff on the same day that they had sold for his account and risk one hundred North West, at $39\frac{1}{4}$, to Hale & Burr, payable and deliverable that day.

On September 20th, 1867, plaintiff wrote to defendants that he had been sick, and just able to be out; and as they had the discretion to sell, he supposed they would, before it got as low as it was, and that he would send them some money in a few days, if they would hold on.

On September 30th, 1867, defendants mailed to plaintiff an account, showing the sale of the one hundred shares on the 20th, and the balance to his credit of \$17 20.

On October 16th, plaintiff wrote to defendants that the statement was entirely unsatisfactory, and that he would hold them for the amount of his margin previous to their purchase of the last fifty shares. To this defendants made no reply.

On November 21st, plaintiff wrote to defendants that they bought for him, on September 12th, fifty shares North West, at $47\frac{1}{8}$, and now they might sell it. Defendants made no reply.

It was admitted that on October 17th, 1868, the stock was worth \$95.50 per share.

My opinion is that the letter of September 12th, 1867, from plaintiff to defendant, to sell 50 or 100 shares, if the stock looked like reaction, or weakened, or had a downward tendency, was an authority to sell in the event named, and subsisted until countermanded or revoked by implication; that the letter of September 14th, from defendants, was an expression of their opinion that the market would recover from its depression; that plaintiff's order of the 17th (or before) to buy 100 shares was an indication of his confidence in the market from that expression of opinion, but did not revoke his orders to sell if the stock looked like reaction, or weakened, or had a downward tendency, but was an approval of defendants' holding the stock to that time; that the market falling rapidly up to the 20th, justified defendants' acting under the standing order to sell, and

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that they performed their duty to plaintiff by selling on the 20th; and that the plaintiff's letter of the 20th, stating that "as you had discretion to sell, I supposed you would have sold before it got as low as it is," was a recognition and confirmation of the authority to sell as a standing authority in case the stock weakened or had a downward look. The latter part of plaintiff's letter of the 20th, that he would send some money in a few days if they held on, was either prompted by the idea that they had not actually sold (for which he had no grounds), or by the supposition that he was in their debt by the fall in the stock, but in either case is immaterial. The letter of plaintiff, of October 16th, 1867, demanding credit for his margin as it stood before the purchase of the last 50, was too late as a repudiation of that purchase, which he had notice of on September 18th, and which he did not repudiate on the notice of the sale of 100 shares on the 20th, he having ordered to be purchased with 100 shares on or about the 17th. If the defendants bought 50 instead of 100 under the order of the 17th, it is the plaintiff's gain as the sequel proved. However, it is enough to say of it that the complaint recognizes those 50 as having been properly bought for him, and the suit was brought to recover damages for their being improperly sold, together with the 50 shares held on the 12th. The objection, that they were bought without authority, could not be taken at the trial in the face of the complaint as it stood.

It is not unlikely that if the defendants had not sold when they did, the plaintiff would have claimed damages for any loss arising from a depression after the 20th of September (had the market not recovered), and pointed to his letter of the 12th of September, as a positive order to sell in the contingencies named in it. I so regard it, and think defendants acted as they were bound to act under such orders and on a falling market.

There was nothing to submit to the jury, no conflict of evidence, no inference or deduction from facts. The only question—that of authority to sell—was one of law upon undisputed facts. But the plaintiff did not ask the court to submit it to the jury, to draw any inferences or conclusions from the facts, as he might have done. His exception to the dismissal of the

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complaint only brings up the question, whether, on the conclusions of the court on the undisputed facts, the plaintiff had failed to make out his case (*Dows v. Rush*, 28 Barb. 180; *Mallory v. Tioga Co.* 3 Keyes, 356; *Barnes v. Perine*, 12 N. Y. 23; *Winchell v. Hicks*, 18 Id. 558). I think he had.

The question objected to, as to whether defendants had sold the 50 or 100 referred to in plaintiff's letter of the 12th of September, 1867, was improper, because there was evidence of only one sale after that date, viz., of September 20th, 1867, of 100 shares, and no other sale, and there was no evidence that defendants, on the 12th of September, or afterwards, held any stock for plaintiff, except what they sold on the 20th. The exception, in folio 55, is not argued on the appellant's points, and is not tenable, for the reasons stated in the court below, in sustaining the objection.

The plaintiff is entitled to \$17 20 and interest, which should be credited upon defendant's judgment for costs, and the judgment for the balance should be affirmed (Code, § 330; *Chouteau v. Suydam*, 21 N. Y. 185; *Brownell v. Winnie*, 29 N. Y. 400).

No costs of this appeal should be allowed, as neither party has entirely prevailed upon it.

Judgment accordingly.

White v. Sweeny.

JAMES F. WHITE AND OTHERS v. DANIEL M. SWEENEY AND OTHERS.

The indorsement of plaintiffs to certain checks payable to their order, and belonging to them, was forged, and upon such forged indorsement the checks were, in good faith, cashed by A., who, for value, indorsed them to B., who deposited them in his bank C., which collected them, and credited B. with the proceeds. *Held*, that plaintiffs might sue A., B. and C. for a joint conversion of the checks, without making a demand.

A return of the paid and canceled checks to the plaintiffs, after suit brought, will not constitute a defense to the action.

The plaintiffs' ownership of the checks in such an action, may be shown by the fact of the checks being made payable to their order, and by proof of the transactions in which the checks were given.

APPEAL by defendants from a judgment entered on the verdict of a jury, at trial term, under the direction of a judge.

Action by plaintiffs (composing the firm of James F. White & Co.) against Daniel M. Sweeny, John B. Frink and the National Park Bank, for the conversion of two checks payable to, and the property of, the plaintiffs.

The facts are stated in the opinion.

R. S. Guernsey, for Frink & Sweeny, appellants.

Barlow & Hyatt, for National Park Bank, appellant.

C. W. Bangs, for respondents.

BY THE COURT.*—ROBINSON, J.—The answers of the defendants Frink and Sweeny, each alleged that the several checks, payable to the order of the plaintiffs, for the conversion of which this action was brought, were "duly indorsed by the payees therein."

The plaintiffs' title to the checks was shown not only by their being obligations payable to them, but also by proof of

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

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the transactions in which they were given. The evidence that their indorsement was forged, stands uncontradicted, and there was no evidence offered from which it could be presumed that they had ever consented to any transfer of the checks. Upon such forged indorsements the defendant Frink, in good faith, cashed the checks and passed them to the defendant Sweeny, for full value and in good faith. Mr. Sweeny deposited them with the defendants The National Park Bank, and received credit on account for them. The bank admits the checks were in its possession at the time of the alleged conversion, and at the commencement of the action, and by the answer claim they were "*their property*."

It appeared on the trial that these checks had been presented to the banks on which they were drawn (one on The Continental and the other on the Importers' and Traders' Bank); that they were paid upon the forged indorsements of the plaintiffs and charged to the respective accounts of the drawers. The right of the plaintiffs to maintain an action for the conversion of their property in these checks is well established by the case of *Talbot v. Bank of Rochester* (1 Hill, 295), as is also the right to join the successive transferees in one action by the case of *Nichols v. Michael* (23 N. Y. 264). See also *White v. The Mechanics' National Bank*, *post*, p. 225. No demand was necessary as to either defendant. Frink and Sweeny had transferred the checks, and The Park Bank had collected them. Besides they severally put the plaintiffs' title in issue. They each assumed and exercised the right of an owner, and claim to have held the checks in their own right. In bringing this action, the plaintiffs do not, until satisfaction of their claim, confirm or assent to the acts or title of any wrong doer, except that they probably affirm the payments made by the banks on which the checks were drawn and their absolute conversion by means of payments made by the drawees.

In recognizing the agency, they do not impair their remedy against the agents, through whom a wrong had been effected.

Under these views, the mere return to plaintiffs of these paid and canceled checks, after suit brought, the extinguishment of which as a subsisting liability was recognized by the

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suit for their conversion, constitutes no defense to the parties through whom the wrong has been consummated. No issue of fact for determination by the jury being presented, the verdict for plaintiffs was properly ordered in their favor.

Judgment affirmed.

**JAMES F. WHITE AND OTHERS v. MECHANICS' NATIONAL BANK
AND ANOTHER.**

The plaintiffs were the owners of certain checks in which they were named as payees. Their indorsement was forged, and the checks so indorsed were passed to A. for value, who deposited them for collection with his bank. The latter collected the checks from the drawee, and credited A. with the proceeds. *Held*, that a joint and several action was maintainable by the plaintiffs against A. and the collecting bank for the proceeds of the checks.

Although the bank may not have acted in any other capacity, or under any other claim, than as collecting agent for A., it is, nevertheless, equally liable for its acts on behalf of a principal who could confer no such authority. Both A. and the bank, having contributed to the same injury, are bound to render but a single satisfaction.

EXCEPTIONS to a judge's charge, directing a verdict for plaintiffs, ordered to be heard at general term.

Action for the conversion by the defendants, The Mechanics' National Bank and the Camden & Amboy Railroad and Transportation Company, of five checks drawn to the order of and belonging to the plaintiffs.

On the trial it appeared that the checks, with the forged indorsements, had been in good faith received by the Camden & Amboy R. R. and Transportation Co., who had deposited them with the Mechanics' Bank, and by whom they had been collected.

Defendants moved for a dismissal of the complaint, on the grounds: 1. That there was no evidence to charge the defend-

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ants jointly or severally with a wrongful conversion of the checks; and, 2. That the evidence failed to show that the plaintiffs were ever the owners, or were ever entitled to the possession of the checks.

The other facts necessary to an understanding of the case are stated in the opinion.

Charles F. Sandford, for defendants.

This action is in form *ex delicto*, and the allegations of the complaint charge the defendants *jointly*, and *not otherwise*, with the perpetration of the several wrongs, by reason whereof the plaintiffs claim to recover damages. The proofs, if sufficient to charge either defendant at all, establish no joint liability against both. If the defendants are, or either of them is, liable at all, they are severally liable, each upon separate and distinct grounds peculiar to each, and neither of them can be charged with liability, by reason of the acts upon which the liability of the other depends. Two persons cannot be thus held *jointly* liable unless there is a *joint* conversion (*Nicoll v. Glennin*, 1 Maule & Sel. 588; *White v. Demeray*, 2 N. H. 546; *Hess v. Buffalo & N. Falls R. R. Co.* 29 Barb. 391; *Eldridge v. Bell*, 12 How. Pr. 547).

John Sedgwick, for plaintiffs.

I. If the evidence showed a wrongful conversion of the checks in question by the defendants, jointly or separately by both, the motion to dismiss was properly denied. There was no claim that, if the defendants were guilty separately, the plaintiff must elect as to which he would proceed against; but the claim simply was as to the defendants, separately considered, that each was not guilty of the tort.

II. The indorsement of the payee's name was forged. Having no title to the checks, the Camden & Amboy Railroad Company (one of the defendants) took the checks as their own property, parted with the possession of them to the Mechanics' National Bank (the other defendant), which received and collected them from the bank on which they were drawn,

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as if the plaintiffs had no title to them. This was conversion by each. It is an immaterial circumstance that the defendants acted in good faith, in a moral sense. Nor is the Mechanics' National Bank the less liable because in the transaction it acted as the collecting agent only of the Camden and Amboy Railroad. This would be so, even if it acted without compensation; but as a matter of fact, the money it collected on the checks became its own money, and was used by it.

No demand and refusal were to be shown by plaintiffs. The original taking was tortious, and the defendants had parted with the checks (*Decker v. Mathews*, 12 N. Y. 313; *Canal Bk. v. Bk. of Albany*, 1 Hill, 287; *Talbot v. Bk. of Rochester*, Id. 295; *Purves v. Moltz*, 5 Robt. 653; *Everett v. Coffin*, 6 Wend. 603; *Delamater v. Miller*, 1 Cow. 75; *Murray v. Burling*, 10 Johns. 175; *Carroll v. Cone*, 40 Barb. 220).

III. The acts thus done by the defendants made them jointly liable for the conversion. As strict matter of fact, they participated at the same time in the conversion—that is, at the same moment the railroad company deposited the checks with the bank, the bank received them from the railroad company. Moreover, the authority and command from the railroad company to do for them what the bank did, both as agent and indorsees, continued through the conversion by the latter (*Cobb v. Dows*, 10 N. Y. 337; *Sprague v. Kneeland*, 12 Wend. 163; *Nichols v. Michael*, 23 N. Y. 272).

BY THE COURT.*—ROBINSON, J.—There is no question made by the pleadings as to the original title of the plaintiffs as payees of the checks, for the conversion of which this suit is brought.

It is averred, in the answer, that they were so drawn; and it is claimed that they were, by the general indorsement of the plaintiffs, duly transferred to the defendants, the Camden & Amboy Railroad and Transportation Company, in the regular course of business and for full value, which company received them in good faith, and deposited them with the Mechanics'

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

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National Bank for collection. That bank caused them to be presented to the bank on which they were drawn, and collected them.

The title of the plaintiffs to the checks was evidenced by their being made payable to their order, as well as by proof of the transactions in which they were given as payment. If any error had occurred in receiving in evidence the receipts of their collecting agent as part of the *res gestæ*, it was wholly immaterial, as the original ownership of the checks by the plaintiffs, as to which the testimony had any bearing, is not questioned by the pleadings.

The proof showed the alleged indorsement by the plaintiffs (through which title to and authority to collect the amount of these checks was claimed by the defendants) was a forgery, but it is claimed by each defendant that neither a joint nor several action for the conversion of the checks can be maintained against them. This position is not tenable. Each defendant has dealt with these checks in derogation of plaintiffs' title, claiming through the forgery, and they have by their concurrent action made a conversion of the checks, and realized therefrom their full amount. Although the bank does not appear to have acted in any other capacity or under any other claim than as collecting agent for the railroad company, it is equally liable for its acts on behalf of a principal who could confer no such authority. Both defendants have contributed to the same injury, and are to render but a single satisfaction (*Thomas v. Ramsey*, 6 Johns. 26). Even without this community of interest, where a party has wrongfully obtained possession of goods, and has transferred them to another, both parties may be joined in an action for the wrong (*Nichols v. Michael*, 23 N. Y. 264).

The plaintiffs had their election either to sue in trover, as for conversion, or to recover the amount in an action for money had and received (*Talbot v. Bank of Rochester*, 1 Hill, 295).

They elected the former remedy, and are entitled to judgment in their favor for the amount of the verdict, with interest and costs.

Judgment on the verdict, with interest and costs.

Boomer v. Brown.

MICHAEL BOOMER v. RICHARD BROWN.

In the provisions of the Code of Procedure relative to appeals from judgments of the Marine Court (§§ 351 to 371 inclusive), the term "*justice*" is used as correlative, or of equivalent meaning, with the various terms "Marine Court," "Assistant Justices' Courts of New York city," and "Justices' Courts of cities," or as synonymous with the term "the court below."

Under the provisions, therefore, of § 371 of the Code of Procedure in regard to costs, on appeal to the Common Pleas, which provide that "wherever costs are awarded to the appellant, he shall be allowed to tax, as part thereof, the costs and fees paid to *the justice* on making the appeal, as disbursements, in addition to the costs in the appellate court; and when the judgment in the suit *before the justice* was against such appellants, he shall further be allowed to tax the costs incurred by him, which he would have been entitled to recover in case the judgment below had been rendered in his favor;"—on an appeal from a judgment of the general term of the New York Marine Court, the appellant on reversal may tax as costs the fee paid to the clerk of the Marine Court for making the return, and also the costs incurred by him which he would have been entitled to recover in case the judgment in the Marine Court had been in his favor.

The case of *Ellert v. Kelly* (4 E. D. Smith, 12) distinguished and explained.

APPEAL from an order.

The plaintiff recovered a judgment against the defendant in the N. Y. Marine Court, which on appeal to the general term of that court was affirmed. On further appeal to this court the judgment was reversed. Upon taxation of the costs of the defendant on such reversal, the clerk allowed him, in addition to the costs of this court and the fee paid to the clerk of the Marine Court for making the return, "the costs incurred by him which he would have been entitled to recover in case the judgment below (appealed from) had been rendered in his favor," under the construction of the code that the provision in § 371, as amended in 1862, allowing such costs to the appellant on reversal, applies to appeals from the Marine Court. On appeal from such taxation to the judge at chambers, it was affirmed and this appeal was taken from that decision.

Henry Cooper, for appellant.

Charles H. Woodbury, for respondent.

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BY THE COURT.*—ROBINSON, J.—Appeals to this court from judgments of the Marine Court are regulated, and the only mode of reviewing such judgments is as prescribed, by chapter V of the second part of the Code of Procedure (§§ 351 to 371).

Section 352, as amended in 1857 and 1862, limited such appeal to an “actual determination” of the general term of that court. Throughout the various sections of this chapter regulating the mode of proceeding, the term, “justice” is used as correlative or of equivalent meaning with the various terms “Marine Court,” “Assistant Justices’ Courts” of this city, and “Justices’ Courts of cities” or as synonymous with the term “*the court below*.” Section 354, as amended in 1851, required the appellant, “at the time of serving the notice of appeal on the justice,” to pay him the costs of the action included in the judgment, and two dollars costs of the return.

As amended in 1852, ’57 and ’58, and as it now stands, it requires that the notice of appeal must be served “on the justice personally,” &c., although a further provision was made in the amendment of 1858, allowing service of the notice of appeal on the justice *or on his clerk*.” This section also provides that on appeals from the Marine Court of this city, for the payment *to the clerk* of two dollars costs of the return, and on those from the District Courts for the like payment, either to the justice or his clerk (such clerk being recognized by law). The undertaking on appeal is to be “approved of by *the justice of the court below*” or a judge of the appellate court. For a stay of execution as provided in § 355, security is to be given as prescribed in § 356, by an undertaking “to be executed by one or more sufficient sureties, approved by the county judge (amendment of 1849) *or by the court below*.” By § 357, the delivery of the undertaking “to the court below shall stay,” &c. the issuing of execution. By § 358, “where by reason of the death of *a justice of the peace* or his removal from the county or any other cause, the undertaking on appeal cannot be delivered to him, it shall be filed with the clerk of the appellate court, and notice thereof given to the respondent,” &c., and

* Present, DALY, Ch. J., ROBINSON and LOEW, JJ.

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“it shall thereupon have the same effect as if delivered to the justice.” By § 359, when the affidavit and notice of appeal shall have been served, “the respondent may make a counter-affidavit, a copy of which shall be served on the justice,” &c. Section 360 provides that “no justice of the peace shall be bound to make a return, unless the fees prescribed, &c., be paid on the service of the notice of appeal.” Section 361 enacts that “when a justice of the peace, by whom a judgment appealed from was rendered, has gone out of office before a return is ordered,” he shall, nevertheless, make a return in the same manner, and with like effect, as if he were still in office. Section 363 provides “that if a justice of the peace, whose judgment is appealed from, shall die, become insane, or remove from the State,” the appeal is to be determined upon proof of the facts and circumstances of the trial or judgment. By § 366, “If the issue joined before the justice was an issue of law, the court shall render judgment thereon according to the law of the case.”

It is further to be observed, that the appeal from the judgment of a justice of the peace, is in law not from him, but from the *court* held by him. By 2 R. S. 225, § 1 (part iii, tit. iv, art. I, of Rev. Stat.), justices of the peace are authorized to hold *a court* for the trial of all actions subsequently enumerated. So, too, by tit. iii, 2 R. S. 224, § 1, the justices of the Marine Court of the City of New York are authorized and required to hold *a court* in the said city, to be known as “The Marine Court of the City of New York” (§ 5), “with the jurisdiction and powers, to be held at the times and places, and proceed in the manner, specially provided by law.”

From this collation of these several provisions of the code, it appears they make varied and indiscriminate reference to the courts subjected to their operations, and to the officers holding them; to the intangible thing styled “a court,” and that which is tangible, *the justice* holding it, who, having been himself the actor in rendering the judgment, is made the person required to do the subsequent acts necessary to perfect the appeal, and there can be no doubt, but that the terms in § 371 of the code, “that when the judgment in the suit *before the justice* was

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against the appellant," refer to and include such a judgment rendered by the justices of the Marine Court, as in this case, as well by any of the other courts referred to in that section, and that as a judgment of the Marine Court could only be appealed from to this court, upon "a final determination" of its general term (as this court has held in *Frank v. Benner*, 3 Daly, 422, in harmony with the construction put upon the terms "*actual determination*," in § 11 of the code, *Folger v. Fitzhugh*, 41 N. Y. 228, precluding appeals from an order granting a new trial), the judgment appealed from was within the meaning of the code, § 371, one rendered "before a justice."

The costs directed to be awarded under this section of the code, in analogy to appeals in other cases, provided for in § 330, include such as the successful appellant has been deprived of by the erroneous judgment, or, in the language of the section, "the costs incurred by him which he would have been entitled to recover, in case the judgment below (appealed from) had been rendered in his favor;" and it makes no difference, whether such costs accrued simply on the entry of the original judgment, or were by law such as ought to have been awarded him as costs in the progress of the cause, either on further hearing before the same justice, or upon appeal to his colleagues at general term. The true test is as to their being such costs as he would have recovered upon the occasion of the rendering of the erroneous "final determination" from which he appealed, in case that "judgment had been rendered in his favor."

Ellert v. Kelly (4 E. D. Smith, 12), was decided, in 1855, before the amendment to § 371 of 1862, directing that whenever the appellate court, on such reversal, awards costs to the appellant, and the judgment in the suit before the justice was against him, he shall be further allowed to tax such costs as he would have been entitled to recover had the judgment below been rendered in his favor, and cannot control the mandatory requirements of that statute. The remarks of Judge Woodruff, in that case, as to the judgment below not being a final determination of that controversy, and as to the power of the court

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to give final judgment for the party prevailing on the appeal, are contrary to the subsequent rulings of this court, that it has no power to order a different judgment, but can simply affirm or reverse in whole or in part (*Frazer v. Child*, 4 E. D. Smith, 243 and 245, note; *Hardy v. Seelye*, 1 Hilt. 90).

For these reasons, the order appealed from should be affirmed, with costs.

Order affirmed.

RICHARD WARING AND ANOTHER v. THE UNITED STATES
TELEGRAPH COMPANY.

The rule that a person is presumed to admit a fact stated in a conversation with him, and not denied by him, does not extend to a letter received by him, and the fact that he does not, in replying to such letter, deny an allegation made therein, cannot be used to prove an admission by him of such fact.

Plaintiffs having a claim for damages against a telegraph company, wrote a letter to the president, stating what they claimed to be the facts in the case. The president's reply merely stated that he had submitted the letter to the counsel of the company for his opinion on it, and afterwards sent plaintiffs a written opinion of the counsel, adverse to the claim. *Held*, that the letter could not be introduced in evidence as an admission by the company of the facts alleged in it.

Where improper testimony has been admitted in evidence, unless the court can say that the jury were not influenced by it, and that it could not by any possibility have affected the verdict, a new trial will be ordered.

APPEAL by defendants from a judgment entered on the verdict of a jury at trial term.

Action for negligence in sending a telegraph message.

On the trial the plaintiffs put in evidence the correspondence referred to in the opinion, and to its admission an exception was taken by the defendants.

The material parts of the letter of the plaintiffs, containing their statement of their claim against the company is as follows:

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Pittsburgh, March 13th, 1865.

JAMES MCKAYE, Esq.,

Pres. U. S. Telegraph Co.

SIR—On the 16th of December, 1864, we received from J. Macy's Sons, New York, a communication stating that they could sell refined oils in bulk, delivered in New York, for 81 and 82.

Having, in consequence of these advices, purchased 2,000 barrels of oil, H. H. King, at 12.10 p. m. on December 17th, 1864, left a despatch at the office of your company in this city, with the manager, S. L. Fulwood, in person, directing J. Macy's Sons to sell 500 barrels standard brands, January delivery. King and Fulwood had a communication of several minutes' duration, concerning the importance of *promptitude* in sending and delivering "petroleum" despatches. King informed Fulwood that we were very anxious that our despatches should reach New York before one o'clock, and Fulwood assured him that the despatch should go forward immediately. At 12.45 p. m. on the same day, Alex. Semple left the following despatch, viz.: J. Macy's Sons, New York,—Sell 1,500 more standard brand, January delivery. About 2.40 p. m. O. T. Waring left a despatch, saying: J. Macy's Sons, New York. Make delivery of 1,000 barrels as late as January 10th,—fear difficulty in getting cars quite so soon. At the time he left this despatch, he inquired if our previous despatches to J. Macy's Sons had gone forward, to which the clerk at the counter answered "Yes," and Mr. Fulwood, who was standing outside of the counter, spoke up and said, "Yes, they have gone." Late in the afternoon we received a despatch from Philadelphia, which, from its tenor, led us to believe that a despatch which we had sent to Philadelphia some hours earlier had failed to go through. This made us apprehensive that our New York despatches might not have gone, and R. S. Waring at once went to the telegraph office (this was after five o'clock, p. m.); he asked the clerk at the counter if our despatches had gone; the clerk said, "Yes, sir." He said, "Are you *sure*?" to which the clerk replied that he would go up stairs and see. Mr. Waring, feeling greatly exasperated, ran up stairs with the clerk, and found the operators' room occupied by *one small boy*.

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He inquired if our despatches to New York had been sent yet? The boy, not appearing able to answer promptly, and Mr. Waring observing that he was engaged in sending despatches from the *top* of a pile, apparently thirty or forty, took the pile in his hands, and found our first two despatches at the very bottom of the pile, the third and last despatch being the only one which had yet been sent.

This last despatch reached our correspondents, and was of course incomprehensible without its precursors; and they telegraphed us to know if they *might* sell 1,000 barrels at 81 and 82 cents, but their despatch reached us too late to be of any service, *i. e.*, long after business hours; and the news of successes by our armies received on Sunday caused a decline in gold, and a consequent decline in oil, which so weakened the market that large sales could be effected. H. H. King immediately started for New York, and reached there before Monday at daylight. Josiah Macy's Sons informed him that they could easily have sold 2,000 barrels, even after four P. M., on Saturday. Mr. King tried to sell on Monday, but failed utterly to get an offer. The 2,000 which would have been sold at 81 and 82 cents but for the gross negligence of the employees of your company, in either not at once sending or declaring their inability to send immediately our despatches, were sold to the best advantage possible according to our own opinions at the time, modified by those of experienced dealers in petroleum in New York, in lots of various sizes at prices ranging from 74 cents down to 65 cents; and we find, upon receiving account of sales, that instead of realizing a clear profit of from \$2,500 to \$3,000, as we undoubtedly would have done if our despatches had not been detained, we actually made a net loss of precisely \$9,880 23, thus making a difference to us of nearly \$13,000.

&c., &c., &c.,

WARING & KING.

The substance of the various other letters put in evidence is stated in the opinion.

Plaintiffs had a verdict for \$6,600 damages, besides interest.

BY THE COURT.*—DALY, CH. J.—The defendants rest

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their application for a new trial upon one ground solely, that it was error on the part of the court to allow the letters which had passed between the 13th of March and the 19th of September, 1865, to be used as evidence in the cause, and the plaintiffs have furnished no answer to it. The correspondence was objected to as irrelevant, and it certainly was, as it took place after the cause of action had arisen, and had relation to the settlement of the plaintiffs' claim without suit. The first letter of March 13th is an elaborate statement in narrative form, on the part of the plaintiffs, of the facts and circumstances relied upon by them, as showing that they were entitled to recover from the company the sum of \$9,880 23, and was written with a view of being laid before the board of directors of the company. The next was a letter of the plaintiffs asking what decision had been arrived at by the company, and was followed by a brief answer from the president that the subject of the claim had been referred to their legal adviser. This was followed by a letter of the plaintiffs, complaining of the course that had been taken, and asking what conclusion the counsel had come to. The remaining parts of the correspondence consist of further letters of the plaintiffs, wishing to know whether the defendants had concluded to refuse or to pay the claim, and further letters from the president apologizing for the delay, and finally transmitting the written opinion of the company's counsel, which was adverse to the plaintiffs' claim. This correspondence was not, it would seem from the judge's remarks, admitted as of any materiality in itself. He said that if it contained admissions as to the hour of receiving the despatch, he thought it proper that it should go to the jury; that "the fact was material to the issue and the operation of it, and its denial or admission in a subsequent letter he would allow to go to the jury as a part of the *res gestæ*." The letter of the plaintiffs with which this correspondence opened did contain a statement of the exact time when the despatch was left at the company's office, to wit, the 17th of December, 1864, at 10 minutes past 12 o'clock, P. M. There was no admission or denial of this or of any of the facts consecutively detailed in the first letter written by the plaintiffs, unless the omission of the company or of any of its

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officers to deny formally by letter, what was contained in the plaintiffs' letter to the president, is to be construed into an admission of everything that was stated in that letter, which would be carrying the rule respecting admission to an unwarrantable extent. "What is said to a man before his face," said Lord Tenterden in *Fairlie v. Denton*, 3 Carr. & Payne, 103, "he is in some degree called upon to contradict, if he does not acquiesce in it; but the answering of a letter is quite different, and it is too much to say that a man by not answering a letter, at all events, admits the truth of the statements that letter contains." In the present case, a party having a claim against a corporation writes a letter to its principal officer, giving a detailed statement of all the facts upon which the claim is founded, that it may be laid before the board of directors, in the expectation that it will satisfy them of the liability of the corporation, and that they will direct it to be paid, and is officially answered by the secretary of the company that the subject of the claim has been referred to their legal adviser, and after some time has intervened, the president transmits the written statement of the counsel, that in his opinion the company have a good defense, and that he advises against paying the claim. There is nothing in this that can be regarded as an admission of the facts contained in the plaintiffs' letter or which would entitle it to be read in evidence to prove these facts. It would be preposterous to hold that all the facts stated in it were admitted by the corporation, because the president, secretary, or some officer of the company, in an application for compensation for alleged damages, did not, by letter, deny the truth of them. Even admissions inferred from acquiescence in verbal statements made in a party's presence, are received only where the declaration or statement made is of a kind which calls for immediate contradiction, or is such as would naturally provoke or would lead to some action or reply on the part of the person to whom, or in respect to whom, it is made, because inference from a party's preserving a silence is a very dangerous kind of evidence, and is to be kept within very strict limits (*Child v. Grace*, 3 Carr. & P. 193; 14 Serg. & Rawle, 393; 1 Greenleaf Ev. § 199).

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It was not essential to resort to this correspondence to prove the time when the first message had been delivered, for the plaintiffs' witness King had already testified that he left the message at ten minutes after 12 o'clock, P. M., by the clock on the wall of the telegraph company, and identified, as his, an entry on the message to that effect, made at the time, and that he stated to the person that was there, the witness Fullwood, the time, as indicated by the clock, and explained to him how necessary it was that the message should reach New York by one o'clock. Now, the witness Fullwood testified that he had no recollection of receiving the message from King, or of having had any conversation with him that day; and the person whose duty it was to receive messages, the witness Fulton, testified that he received it at *fifteen* minutes after 12 o'clock, P. M.; that he noted the time in a book, and took it from the clerk in the office.

The judge regarded the time when the despatch was received as material to the issue, and it certainly was, for there was conflict upon that point between the plaintiffs' and defendants' witnesses, and conflict, also, in respect to what subsequently occurred throughout the day. The letter of the plaintiffs, which the judge admitted, not only corroborated the statement of the witness King, as to the exact time, but also the testimony of both King and Waring the plaintiffs, in respect to other matters occurring during the day between them and the defendants' employees, and also contained statements of facts, which neither of them had testified to. Now, being received as an admission on the part of the defendants, it is impossible to say what effect it may have had upon the jury. It was an action for negligence, and the judge left it to the jury to say whether the messages failed to reach their destination because of the misconduct and negligence of the defendants' agents. If the facts were as set forth in the plaintiffs' letters, it was a very plain case of negligence, and the jury, for all we know, may have treated what was stated in the letters as admitted by the defendants, because there was no denial of it on their part by letter. Some very material things bearing upon the question of negligence were stated in this letter, and were not verified by the plaintiffs' witnesses, one of which will suffice. The letter states that when

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the second message was delivered at the office by Semple at 12.45 o'clock, P. M., he inquired if the previous despatches had gone forward, and that the clerk at the counter answered, "Yes," and Fullwood, the manager, "Yes, they have gone," which, if they had so stated, was untrue, and calculated to mislead the plaintiffs. But Semple, when examined as a witness, gave all the conversation that took place at the telegraph office that he could remember, and says nothing about his having made the inquiry. The fact was material, for the plaintiffs' witness Waring fixed the time of the sending of the second message at about 15 minutes past one o'clock, and at that time Fullwood was not in the office, for he went to his dinner at twelve, and returned at half-past one or about two o'clock, and the letter and the testimony of Waring together was to the effect that the plaintiffs' agent was told that the two first messages had been sent to New York; and the plaintiff King testified that if Fullwood had not answered, when they sent to the telegraph office at 2.30, "Your two despatches are gone—if he had not made that misrepresentation—he, the witness, would have taken the two despatches and sent them with the third at 2.30, as sales could then be effected in New York before five o'clock. Now, Fullwood had no recollection of saying this, and in reply to a juror, testified that the general course, when the line was down, was to say, when a message came, "We cannot put yours through; go to another line;" so that the fact whether he made the misrepresentation or not in respect to the two first messages, was a very material question in the case. Indeed, King testified that if they had got the two despatches when they took the third to the other office, they would have effected the sale.

The defendants' operator testified that it was a cloudy, wet, and gloomy day. That the wires were in working order until half-past 11 o'clock, A. M., when the last message was sent by him, and were interrupted from that time until half-past three o'clock in the afternoon, when the next message was sent, and that they continued in order until nine o'clock in the evening. That when the interruption was temporary, it was customary to receive messages, but that when the derangement was serious, and likely to cause considerable delay, it was customary

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to inform customers of the fact when offering their messages. The point in the case, therefore, was whether the defendants' agents had been advised of the importance of the immediate transmission of the plaintiffs' two first messages, and had prevented the plaintiffs from sending them by the other lines in time to effect the sale in New York, by representing that they had been sent, when it was not the fact. The two witnesses of the defendants, Fullwood and Fulton, one the general manager, and the other the clerk who received messages, had no recollection of any such statements being made to them or by them, as the witnesses King, Semple, and O. T. Waring testified to. The first message was left, according to the defendants' witnesses, at fifteen minutes past 12 o'clock, P. M., and the second at half-past one, and the line had ceased working for two hours when the second message was received. It is suggested that there is evidence uncontradicted in the case sufficient to warrant the verdict, as matter of law. But I do not think we can assume this. The testimony of Fullwood and Fulton was general, loose, and, as it stands, was unsatisfactory. But the weight or value to be attached to it was for the jury, and the judge very properly left the case upon the whole evidence to them. The plaintiffs' letter, as a statement of fact, was stronger than the other evidence which the plaintiffs gave upon the trial, and, as the defendants' counsel has argued upon the motion, there is a "color" about it that gives a very strong and decided impression of very culpable negligence on the part of the defendants, or rather, of their agents. We cannot say that the jury were not influenced by it; that it could not, by any legal possibility, have affected the verdict; and where such is the case, the only safe course is to order a new trial (*Gillett v. Mead*, 7 Wend. 193; *Benjamin v. Smith*, 12 Id. 404; *Clark v. Vorce*, 19 Id. 232; *Williams v. Fitch*, 18 N. Y. 546; *Anthoine v. Coit*, 2 Hall, 40; *Underhill v. N. Y. & Harlem R. R. Co.* 21 Barb. 496, 497; *Clark v. Crandall*, 3 Barb. 612).

Judgment reversed.

Lewis v. Woods.

JOHN D. LEWIS AND ANOTHER v. LOUISA T. WOODS AND THOMAS B. JONES.

Since the act of 1860 (Laws of 1860, p. 157, ch. 90), by which a married woman is authorized to "carry on any trade or business * * * on her sole and separate account," a married woman who engages in business on her own account is subject to all the regular rules of business in regard to negotiable paper given by her; and is responsible on such paper, although it is not given for the benefit of her separate estate, nor is specially made a charge thereon.

Where the defendant, a married woman, was engaged in business on her own account, a check made by her agent, regularly authorized for that purpose, although made without consideration, in a matter unconnected with her business, and for the mere accommodation of the payee, yet *Held*, to be good against her in the hands of a *bona fide* holder for value, to whom it was indorsed before maturity.

EXCEPTIONS to a verdict for plaintiffs ordered to be heard at general term.

The facts are stated in the opinion.

John A. Shea, for defendants.

Martin & Smith, for plaintiffs.

BY THE COURT.*—ROBINSON, J.—In March, 1866, defendants, being copartners in trade in this city under the firm name of "Woods & Jones," made, by their agent authorized to issue their checks, in the course of the business, a check dated March 8th, 1866, on the Central National Bank, payable to the order of A. P. Gill, for \$1,428 74, which, being indorsed by the payee, the plaintiffs received in good faith, before maturity, and paid therefor a valuable consideration.

The defense was, that the check was made by the agent without consideration, for the mere accommodation of the payee, and not in connection with, or within the scope of the partnership transactions, or with the knowledge or consent, satisfaction, or privity of the defendants. And the defendant,

* Present, ROBINSON and LOWE, JJ.

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Louisa T. Woods, for a separate defense, alleged that she was at the time of the making of the check, and still was, a married woman ; that the check was not given within the scope of the partnership business, nor was it connected with or intended for the benefit of her separate estate.

It was proved that John S. Woods, husband of the defendant Louisa, was agent for the firm, with authority to draw checks in its business, and that the check in suit was an accommodation check given by him outside of defendants' business.

By the act of March 12, 1860, a married woman was authorized to "carry on any trade or business, or perform any labor or services, on her sole and separate account." By virtue of this act, she may embark in any trade or mercantile business wherein the giving of checks or other commercial securities are ordinarily used ; but if she does so, she must accept its benefits with its disadvantages, and in a mercantile business, assumes the ordinary hazards incident to it, and to which merchants, in the course of whose business commercial paper is ordinarily issued, are exposed by their notes or checks, by accident or wrongful design, getting into the hands of *bona fide* holders, and for value, before maturity ; and while they fail to realize any benefit from the transaction, they are yet liable to pay the full amount of the security.

Although Mrs. Woods was a married woman, yet having assumed to act as a "sole trader" and member of a mercantile firm, she accepted the situation, and became responsible as a general partner for the amount of the check, in the same manner and with like effect as if she were an unmarried woman.

There still exists a distinction between debts contracted by a married woman in the course of such trade or business, or for the benefit of her separate estate, and those as to which she is but a surety or guarantor, or which have no connection with either her own trade, business, or separate estate. In the former case, the charge on her separate trade, business, or estate grows out of the very nature and character of the transaction ; in the latter, her obligation creates no debt or charge

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unless it contains or is accompanied with some written evidence of her intention to charge her separate estate (*Yale v. Dederer*, 18 N. Y. 265 ; s. c. 22 N. Y. 450 ; *Corn Ex. Ins. Co. v. Babcock*, 42 N. Y. 613). This check was no mere suretyship. It was issued by an agent authorized by the firm to make such checks, although in a matter disconnected with its business, and came into the hands of the plaintiffs in due course of business, and in full faith of its validity. "When the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice" (*N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 73). As an act of agency, the issuing of this check and its purchase by plaintiffs came within these principles, and as Mrs. Woods was acting entirely *sui juris* in respect to the transaction, she is liable for the amount of the recovery, and judgment should be entered accordingly against her, with five per cent. allowance.

Judgment for plaintiffs.

EDWARD H. HANFORD AND ANOTHER v. SAMUEL SHAPTER.

Where a broker under due employment by the owner, procures the sale of property, he is entitled to his commission on the sale, although the owner may close with the purchaser in ignorance of the fact that the latter has seen the broker, provided he is not misled by any act of the broker.

Where the purchaser, after being sent to view the property by the broker, did not return to him, but, acting on subsequently acquired information, went directly to the owner and completed a contract of purchase with him, *Held*, that this did not relieve the owner from his obligation to pay the broker his commission.

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APPEAL by defendant from a judgment of the general term of the Marine Court, affirming a judgment of that court entered on a decision of a judge at trial term.

The facts are stated in the opinion.

Lewis Johnston, for appellant.

J. H. & B. F. Watson, for respondent.

BY THE COURT.*—JOSEPH F. DALY, J.—The original employment of plaintiffs as real estate brokers by defendant, the owner of the premises, is conceded. It is also conceded that the defendant sold the property to Eno for the price at which he had put it in the plaintiffs' hands. The questions remaining are: 1. Did the employment of plaintiffs by defendant continue up to the time of the sale. 2. Were the efforts of the plaintiffs the procuring cause of the sale (*Chilton v. Butler*, 1 E. D. Smith, 150; *Briggs v. Rowe*, 1 Abb. Ct. App. Dec. 189, s. c. 4 Keyes, 424).

On the first point the judgment below is conclusive, because the justice so found upon conflicting evidence. Both the plaintiffs swore positively that they were not told to desist from their efforts to sell the property, and knew nothing of their signs being taken down from the premises, nor of the pictures being demanded from them. This was sufficient to sustain a finding that their original employment continued for the period in question—from April to September, 1870. There could be no judgment for the plaintiffs unless the justice so found, for there was no ratification, in case the original employment ceased, the defendant not being aware that Eno, the purchaser, came to him through the efforts of plaintiffs.

On the second point it seems the evidence is ample to sustain the judgment on the ground that plaintiffs were the procuring cause of the sale to Eno.

Eno was looking for a house at Newtown, and his employer, Praul, was assisting him to find one.

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ.

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Both of them knew that the defendant's house was for sale. Praul and one Scheller had endeavored to persuade Eno to buy it, although Praul did not think it good property for him. At this time the plaintiffs happened to speak of and show the property to one Shattuck, as property in their hands to sell; Shattuck already knew it was in the market, and said to plaintiffs that he knew parties who would buy it; plaintiffs told him to go and look at it. Shattuck went and saw Praul, and told him this property was good property for Eno. Praul asked who were the agents; Shattuck told him to go and see plaintiffs, and put plaintiffs' address on one of his own cards, and gave it to Praul. Praul went to plaintiffs, who told him the price, \$4,500, and said there was a family in the house who would allow him to enter by giving plaintiffs' name. Praul, with a card, with plaintiffs' address on it, went up to the property with Eno and looked at it, but could not get in except by the back door, the house being unoccupied; while there, one Walker, a former tenant, who formerly had authority to sell the property, came up and told them that Shapter was the owner of the house and that the price was \$4,000. Eno then asked Praul next day to go and see Shapter. Praul did so, and Shapter asked \$4,500. Eno bought it from Shapter at that price within six or seven days after, telling Shapter that there was no broker in the matter. It is very clear that although Shattuck knew that the property was for sale, and that some parties would buy it, he never made any effort to bring about a sale until plaintiffs spoke to him about it, when he went to Praul and gave him plaintiffs' address. Although Praul and Eno had been looking at the property they made no movement to negotiate for it until they went to look at it with plaintiffs' card, obtained from plaintiffs by Praul. Although Walker had some authority to sell, he only gave voluntary information to parties already sent to the premises by plaintiffs. He must be regarded as a volunteer (*Briggs v. Rowe, supra*). Praul must be deemed to have been the agent of Eno, as his acts were accepted by him, and the information given by plaintiffs to Praul were given to Eno and acted on by him (*Id.* 198).

Although the purchaser, after being sent to view the prop-

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erty by the plaintiffs, did not return to them, but acting on subsequently acquired information went directly to the owner and closed the bargain, this will not relieve the latter of his obligation to pay the plaintiffs (*Chilton v. Butler*, 1 E. D. Smith, 150; *Ludlow v. Carman*, 2 Hilt. 106).

If the plaintiffs, as brokers under due employment by the owner, are the procuring cause of the sale, they are entitled to commissions although the owner may close with the purchaser in ignorance of the fact that the latter had seen the brokers, if he is not misled by any act of the broker.

The judgment should be affirmed, with costs.

Judgment affirmed.

ADELE BRIOSO v. PACIFIC MUTUAL INS. CO.

As a general rule, a court of equity will only interfere to correct a mistake in a written instrument, where it has been mutual, and does not embody the terms, as fully understood by *both* parties. But this rule does not prevail, either where the party against whom the relief is sought has acted in bad faith or disingenuously, with full apprehension that the instrument did not express what the other party desired or intended, or where confidence was reposed in him, and he was entrusted with and assumed the preparation of the instrument, but has, in its preparation, either wilfully or negligently, omitted what had been clearly stated to him as the intention of the other party, who, relying on its correctness, and without particular examination of the document so prepared, incautiously assents to it, under the supposition that it conforms to the verbal terms of the negotiation, as previously agreed upon.

Plaintiff being insured with defendants by a maritime policy providing that "no shipment was to be considered insured until approved and indorsed on the policy by the company," received advices of a shipment for his account, and took the letter of advice, together with the invoice and bill of lading, to defendants, to have the shipment entered on the policy, and for that purpose left them with defendants' president. The latter made an indorsement on the policy, but not according to the bill of lading, writing "eight boxes of indigo," instead of "18 boxes," and omitting to state that the vessel having the goods on board was to proceed from La Union to Panama "via Realejo." Plaintiff did not see the indorsement on the policy until after the loss occurred, and then discovered, for the first time, that it was not according to the bill of lading.

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Held, that the policy would be reformed so as to make the indorsement correspond with bill of lading.

The owner of goods insured on board a vessel at sea, is not liable (at least, where the barratry of the master and mariners is insured against) for the act of the captain in putting to sea, from an intermediate port, in an unseaworthy condition.

APPEAL by defendants from a decree ordering the reforming of a policy of insurance, and also from a judgment for the amount due the plaintiff under said policy, as reformed.

John McDonald, for appellants.

Pritchard, Choate & Smith, for respondent.

BY THE COURT.*—ROBINSON, J.—The judge before whom the question as to the reformation of the contract of insurance was tried without a jury, was fully warranted by the testimony in making a decree to that effect. The insurance, in respect to which such relief was asked, was an open policy of marine insurance upon a shipment of indigo from La Union (San Salvador, C. A.), to New York; the plaintiff was insured from "barratry of the master and mariners, and all other perils, losses and misfortunes, that have or shall come, to the hurt, detriment or damage of the said goods and merchandise or any part thereof," and it was provided, that "no shipment was to be considered insured until approved and indorsed on the policy by the company." The policy, as frequently occurs, remained with the company, and the application made to this court was to reform the indorsement on it of a risk taken under it of this shipment of indigo, by inserting the words and figures, "18 boxes of indigo," instead of "8 boxes of indigo," and the words, "*via* Realejo," before the word, "Panama," in the indorsement on the policy of the risk in question, which, as entered thereon, was in these terms: "(date) 1860, Feb. 28; (from) La Union; (to) Panama; (amount insured) \$3,500; (rate) 4½; (remarks) 8 boxes of indigo."

On this question Mr. Meyer, agent for plaintiff, swore, that

* Present, ROBINSON, LARREMORE and J. F. DALY, JJ.

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he applied for the insurance on this shipment on her behalf, and on making the application he exhibited to Mr. Edwards, the president of defendants' company, and who acted for them in the transaction, his letter of advice, requesting the effecting of such insurance, and left with him the letter, bill of lading and invoice for the particulars, in which it was stated that the voyage was to be "*via Realejo*" (Nicaragua). It appears that Mr. Edwards thereupon wrote out a memorandum as an application for the insurance, unsigned by plaintiff or her agent, for "\$3,500, on 18 boxes of indigo," per sch. Dos Hermanos, "from La Union to New York *via* Panama, and thence by railroad to Aspinwall, and from Aspinwall by Panama line vessels," with some other particulars (as to provisions by way of warranty) not affecting this question. The defendants agreed to make the insurance, and an entry on the policy was shortly afterwards made, by some officer of the company, in the words and figures first above quoted.

Neither plaintiff nor her agent ever read this memorandum of application, made by the president, nor saw the entry on the policy until after the loss. The vessel, with this shipment of indigo, was lost at sea on the voyage. On application being made for the insurance money, no objection was made by defendants of any wrongful description of the voyage, or any departure by reason of the vessel going into Realejo or Golfo Dolce, or any neglect to have her repaired before leaving either of those ports, but the general objection was made that she was unseaworthy. Mr. Edwards, the president, testifies that Mr. Meyer, on making the application, did not state the name of the vessel by which the shipment was made, but said "he did not know its name." He (Edwards) had no recollection that the bill of lading was shown him; that "*the application was made binding without the name of the vessel, and without stating the description of the merchandise.*" Under the testimony offered, and especially in the want of recollection and uncertainty of defendants' witness as to the delivery to him of the bill of lading, *for the purpose* of a correct description of the voyage and shipment, or of the source from which he obtained the particulars which he noted; the evident mistake made by

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defendants in stating the shipment to be "8 boxes of indigo," instead of (as subsequently corrected) "18 boxes," and the positive and uncontradicted statement of plaintiff's witness, that the letter of advice, bill of lading and invoice were exhibited to the president, on the application and for the purposes of the insurance, furnished satisfactory evidence to overcome the merely formal denial of the answer, and a proper basis for reforming the contract in the precise terms of the application in the particulars which, *by the neglect of defendants' officers*, they failed to notice and incorporate into their indorsement of the shipment on the policy.

It is true, that, as a general rule, a court of equity will only interfere to correct a mistake in a written instrument, where it has been mutual, and does not embody the terms as fully understood by *both* parties; but this rule does not prevail, either where the party against whom the relief is sought has acted in bad faith, or disingenuously, with full apprehension that the instrument did not express what the other party desired or intended; or, where confidence was reposed in him, and he was entrusted with and assumed the preparation of the instrument, but has, in its preparation, either wilfully or negligently omitted what had been clearly stated to him as the intention of the other party, who, relying on its correctness, and without particular examination of the document, so prepared, incautiously assents to it, under the supposition that it conforms to the verbal terms of the negotiation, as previously agreed upon. This transaction took place informally and in the haste of business, and, as well remarked by Judge Brady, in his opinion in adjudging the reformation asked for, "having left the paper (bill of lading) with the president, as stated, he (Meyer) had a right to rely upon defendants' officers making the indorsement in the proper form to secure the benefit of the application, as made, in the absence of any notice to the contrary. That the paper having been placed in the custody of the defendants, it was their duty to read the same, and if their omission to do so visits upon them unforeseen consequences, it is their fault, and not that of the plaintiff or her agent." The bill of lading, disclosing this particular shipment to have been of 18 (instead of

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8) boxes of indigo, and that the voyage from La Union to Panama was "*via* Realejo," the intention of the parties to effect insurance upon it, in the manner and by the route described on the bill of lading, should prevail by the reformation of the contract in conformity thereto. The policy being thus reformed, the other issues came on to be tried before a jury, and a verdict was rendered for the plaintiff.

The points of objection against a recovery asserted by the answer, and sought to be maintained on the trial, were: 1st, that the vessel was unseaworthy on leaving La Union; and, 2d, that by going into Golfo Dolce, an intermediate port, there was a departure from the voyage which released the insurers.

The question as to the seaworthiness of the vessel on leaving La Union was one of fact, fairly submitted to the jury on conflicting proofs, and their verdict ought not to be disturbed. Indeed, if the testimony of some of the crew on which defendants relied was to be credited, the loss of the vessel was imputable to barratry by the master, which was among the risks expressly assumed by the defendants. That the occasion of the vessel going into Golfo Dolce was in consequence of her leaking and unseaworthy condition, is, from the evidence, scarcely a matter of doubt; but the question, whether she was so compelled to go into that port in distress, was also submitted, and the issue found against the defendants.

The judge was requested by defendants' counsel to charge the jury, that if, when the vessel left Golfo Dolce, she was not seaworthy, the warranty was broken, but he refused. He stated: "The point was a new one. All that the insured can be responsible for is the condition of the vessel at the time the voyage commences, and what occurs afterwards they cannot be answerable for"; that "the insured took the responsibility of the vessel being in a fit condition to carry the goods when the voyage commenced"; that "if it ran into port, and the vessel went to sea afterwards, by an improper exercise of judgment on the part of the captain, the owner of the property had nothing to do with that." The defendants' counsel excepted to this charge "to the effect that if the vessel was unseaworthy on leaving

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La Union, and put into Golfo Dolce in an unseaworthy condition, and left there in an unseaworthy condition, the plaintiff was entitled to recover." As to this question of unseaworthiness of the vessel on leaving Golfo Dolce, it would, perhaps, be sufficient answer, that no such issue was raised by the pleadings, nor any exemption from liability claimed on that ground; but aside from this, the charge in this respect was fully sustained by authority.

The law in every contract of marine insurance (without special provision to the contrary) raises an *implied* warranty, as well by the owner of the vessel, as of the cargo, of its seaworthiness at the commencement of the voyage; but this mere implication, predicated upon the requirements of good faith and honest dealings, may be obviated and destroyed by direct proof, of a full disclosure of such facts of unseaworthiness, as preclude the supposition of any such *understanding* between the parties, or where the insurance is of a vessel at sea, where it is well understood the assured could not know her condition. The contract in this case was general against *barratry of the master and mariners, and all other losses or misfortunes that should occasion damage to the goods* on the voyage. The goods were lost by the sinking of the vessel at sea, and it would seem to be a most hypercritical and technical rule of construction that would exempt the insurers from any loss (not expressly excepted) occurring on the voyage, without fault of the assured, after the risk had attached (*Cullen v. Butler*, 5 M. & S. 461). If the vessel, crew, and equipments were sufficient at the commencement of the voyage, the assured fully complied with all her obligations, and she made no warranty that the vessel should continue seaworthy, or as to the future conduct of the managers of the vessel (1 Arn. on Ins. § 244, 5; 1 Phil. on Ins. § 733). In the case of an insurance by the owner of the *vessel*, a qualification may exist in the operation of any such general rule as to accidents happening during the voyage, arising from his own obligation to keep the vessel in suitable condition for the service in which it is engaged; for if, from bad faith or want of ordinary prudence and diligence, he fails to do so, and loss happens *from that cause*, he, and not the

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underwriter, must bear the consequences (*Paddock v. Franklin Ins. Co.* 11 Pick. 227; *Starbuck v. N. E. Mar. Ins. Co.* 19 Id. 198; *Copeland v. Same*, 2 Met. 432; *Am. Ins. Co. v. Ogden*, 20 Wend. 287).

As a general rule, the law, for wise reasons, imposes on a party to a contract subjected to injury through its breach, the active duty of making reasonable exertions to render the injury as light as possible; and if, from neglect or wilfulness, he allows the injury to be unnecessarily enhanced, the increased loss must fall on himself (*Hamilton v. McPherson*, 28 N. Y. 72).

There has been much conflict of authority as to the extent of the liability of the insurer, to the owner of the vessel, for the acts or negligent conduct of the master or mariners; but if it rested upon him, in such a case as that under consideration, it is mainly to be determined by the special terms of the policy, or if it is silent, by the means he, or his agent, possess for making needed repairs, and maintaining the vessel in a fit condition for the voyage, and whether the negligence contributed to the loss (*Redman v. Wilson*, 14 M. & W. 476; *Waters v. Merchants' Ins. Co.* 11 Peters, 213). He was subject to no continued warranty of seaworthiness, nor to any obligation to make any repairs in the port of distress, beyond such as with reasonable diligence could be effected there.

But while such questions may exist, as between the owner of the vessel and the insurer, they in no way impair the right of the owner of the cargo. The master and mariner are not his servants, nor are his rights in any way affected by their misconduct or neglect of duty (*Redman v. Wilson*, *supra*; *Mathews v. Howard Ins. Co.* 11 N. Y. 9). Even as against the claim of the owner of the vessel lost at sea, through one of the risks insured against, the defense that the vessel had left an intermediate port in an unseaworthy condition, could only be sustained by the additional allegation and proof of neglect of facilities there afforded to make necessary repairs; but in a like action by the owner of the insured cargo, the neglect of the managers of the vessel to avail themselves of any such facilities for repair constitutes no defense. Under these considerations it is manifest, that even if there was a want of good judgment

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or care on the part of the managers of the vessel in leaving Golfo Dolce in an unseaworthy condition, the rights of the plaintiff could in no way be impaired or affected, and the exception in any aspect of the case was unavailable.

The judgment should be affirmed.

Judgment affirmed.

JOHN BRENNAN v. SAMUEL LOWRY.

Protest of a domestic note is not necessary, and where the complaint on such a note separately alleges protest and demand and refusal, an allegation in the answer, denying the protest, does not put in issue the question of demand and refusal.

In such a case, the rule that protest includes, by implication, a demand and refusal does not apply.

The promise of the indorser of a note to pay it, made after maturity, is presumptive evidence of demand and notice, and it is not necessary to prove in the first instance that the indorser knew, at the time he made the promise, that no demand of payment had been made.

In such a case, if the indorser wishes to urge as a defense the failure to make demand, he must prove it, and it will then be incumbent on the holder to prove that the promise to pay was made with knowledge of such omission.

APPEAL by defendant from a judgment of the Sixth Judicial District Court.

The facts are stated in the opinion.

S. V. R. Cooper, for appellant.

John R. Reed, for respondent.

BY THE COURT.*—ROBINSON, J.—This was an action brought in the Sixth Judicial District against the indorser of a promis-

* Present, DALY, Ch. J., ROBINSON, and J. F. DALY, JJ.

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sory note. The complaint alleged presentment to and demand of the maker, and his refusal to pay, and that thereupon "the said note was duly protested for non-payment," and notice of protest was thereupon and on the same day duly served upon the defendant. The defendant, in his answer, denied that any notice of protest was served on him, also "that he received any notice of protest or demand, and refusal "to pay said note," and on information and belief, he denied "that said note was protested."

This answer was accompanied by his affidavit denying his having received "any notice of presentment, demand, or non-payment," as provided by the act of 1833, chap. 271, § 8 (3 R. S. 5th ed. 474, § 35), by means of which the certificate of the notary, as to any such facts, became inadmissible evidence to establish any of them.

Parol testimony was given on the trial of due service of notice of protest on the defendant, and of his having subsequently made repeated promises to pay the note. He was examined as a witness on his own behalf, and did not deny making such promise, although he denied receiving any such notice. Judgment was rendered in plaintiff's favor, for the amount of the note, from which this appeal is taken.

Protest of a domestic note is unnecessary (Ed. on Prom. Notes, 50, 184), and the answer, although denying notice of protest, and alleging that the note was not protested, did not controvert the distinct and separate allegation of the complaint, that "payment thereof (the note) was duly demanded from the maker, which was refused." The fact of presentment and demand was not in issue, for even if the term "protest," as has been frequently held *by implication*, communicates the fact of demand and refusal to pay, and fully satisfies the purposes of a notice (*Coddington v. Davis*, 1 N. Y. 186; *Cayuga Bank v. Warden*, Id. 413; *Cook v. Litchfield*, 9 N. Y. 279; *Youngs v. Lee*, 12 N. Y. 551; *Bank of Cooperstown v. Woods*, 28 Id. 545), it is otherwise when incorporated into a contract "to waive notice of protest," in which case it has been held not to include a waiver of actual presentment and demand (*Buckley v. Bentley*, 42 Barb. 646; s. c. 48 Barb. 283); but a waiver of protest in-

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cludes both demand and notice (2 Pars. on Bills, 578, 9; *Coddington v. Davis, supra*; *Porter v. Kimball*, 53 Barb. 667). These principles, however, cannot apply to this complaint, in which the allegations as to protest, and of demand and notice of refusal, are distinct. "*Expressio unius est exclusio alterius*," and no room is left for implication.

Defendant, however, claims that there being no evidence that the note was duly presented and payment refused, his promise to pay, in the absence of any such proof (because the fact of demand and refusal not being proved, it must be held as established that it was omitted), and no proof being offered of his knowledge at the time he made the promise of such omission, it was void, within the principle of the cases he cites (*Trimble v. Thorne*, 16 Johns. 152; *Jones v. Savage*, 6 Wend. 658; *Gawtry v. Doane*, 48 Barb. 148).

This assumes the omission of a demand. It was a fact defendant might have proved, and when shown, the burthen would have been thrown on the plaintiff to show his promise was made under knowledge of the omission; but his undisputed promise to pay furnished *prima facie* evidence, ("*omnia præsumentur rite esse acta*,") that the note had been duly presented and dishonored (*Lundie v. Robertson*, 7 East, 231; Ed. Prom. Notes, 653; *Tibbitts v. Dows*, 23 Wend. 379). In the latter case, Judge Cowen has laboriously collated the conflicting decisions upon this point (including those relied on by the defendant), and the court decide, that when the laches of the holder is not shown, the promise of the indorser, after maturity, is presumptive evidence of demand and notice. Under these considerations the judgment must be affirmed.

Judgment affirmed.

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GEORGE L. FRANKINSTEIN v. ANDREW J. THOMAS.

The plaintiff entrusted a picture belonging to him to A. to deliver to B. & Co., for exhibition and sale. A. took the picture to B. & Co., and obtained a receipt for it in his own name, and pledged the receipt to defendant to secure a loan of money, and the defendant, by means of the receipt, obtained the picture from B. & Co. *Held*, that A. had not been entrusted with the possession of the picture for sale within the meaning of the factors' act (L. 1830, p. 203, ch. 179, § 3), and that the defendant could not hold it as security for his advances made on the faith of the receipt.

In an action for the conversion of an article, the commercial or market value of which is not clearly ascertainable, the court will not disturb a judgment for damages against the wrongdoer based upon the owner's estimate of the value of the article, the wrongdoer having had knowledge of the plaintiff's estimation of the value.

APPEAL by defendant from a judgment of the Third District Court, in an action for conversion of personal property.
The facts are stated in the opinion.

Charles H. Bailey, for appellant.

_____, for respondent.

BY THE COURT.*—DALY, CH. J.—The judgment in this case, upon the points chiefly discussed, was right. Sanders was not, in the language of the factors' act, "entrusted with the possession" of the picture "for the purpose of sale" (Laws of 1830, p. 203, ch. 179, § 3). He was simply authorized to take it to the store of Brown, Spaulding & Co., to be left there for exhibition and sale. The evidence was this: Sanders called upon Mr. Spaulding, a part of the business of whose firm it was to sell pictures, and invited him to go and look at pictures in a place to which he directed Spaulding, which place it is evident, from the testimony, was the plaintiff's room or studio. He showed Spaulding a number of sketches, but the only picture that Spaulding would take, was the picture in question. The

* Present, DALY, Ch. J., ROBINSON and J. F. DALY, JJ.

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plaintiff was not present, nor did Spaulding know anything of the plaintiff, or that he was the owner of the picture, until the plaintiff called at his store to inquire about it. Up to that time, as he testified, he knew no one in the transaction but Sanders. After Spaulding's visit, Sanders told the plaintiff that Spaulding had been to see about some pictures, and wanted the picture in question sent down for exhibition and sale, and the plaintiff gave the picture to Sanders, as he testified, "*to take to Brown & Spaulding's for exhibition and sale.*" Upon this evidence, which was wholly uncontradicted, it is very clear that the possession of the picture was not entrusted to Sanders, in the language of the statute, for the purpose of sale, but to Brown & Spaulding. The plaintiff entrusted the possession of it to Sanders to take to them, and that was all. They, and not Sanders, were the parties in the transaction, who would, within the meaning of the factors' act, "be deemed the owners of the picture, so far as to give validity to any contract for money advanced to them upon the faith thereof," for the simple reason that they were the persons with whom the possession of it was entrusted by the plaintiff for the *purpose of sale*.

When Sanders left it at their store, he did all that the plaintiff had given him any authority to do, so far as appears from the evidence; and his taking a receipt for it, in his own name, to give him the indicia of the right to its possession, and the apparent right of ownership, was a proceeding on his part certainly unwarranted by anything which the plaintiff had done, who had not given it to him to sell, nor given him any right to assume the possession of it, whilst it was in Brown & Spaulding's store upon exhibition, or afterwards. The giving of any such receipt for a picture left for sale was an unusual thing in Brown & Spaulding's business. When Sanders asked for it, Spaulding objected, saying that that was something they never gave, and he obtained it only by falsely representing that the object of the receipt was that the insurance might be transferred to their store, giving Spaulding to understand that the insurance value of it was \$500. It was by this fraudulent contrivance that he obtained the indicia of ownership that enabled him to defraud the defendant, by obtaining an advance from him of

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\$50 upon it, as his own property. There is no essential difference in principle between this case and *Covell v. Hill* (6 N. Y. 374). There, the owner of lumber lying upon the bank of a canal, authorized a party to ship the lumber to a firm in Albany, in the owner's name, and the party shipped the lumber to the firm in his own name, and assumed to sell it to them, drawing upon them for advances, which draft they accepted, giving the assumed consignor credit for the lumber upon his general account, he being largely indebted to the firm. It was held by the Court of Appeals, that the transaction was merely a bailment to the agent, and that he was not a factor entrusted with the possession of the property for sale, so as to be deemed the true owner, under the factors' act. So, in this case, there was but a temporary bailment of the picture to Sanders, that it might be conveyed to the store of Brown & Spaulding, with whom the plaintiff, at Sanders' suggestion, had consented that the possession of it might be entrusted, for the purpose of exhibition and sale.

Under the evidence, the judge fixed the value of the picture at what, I think, was a large sum, but we cannot reverse the judgment upon that ground. The evidence was conflicting as to whether it had any market value or not. Whether there is, in fact, any market value in respect to pictures, or any commercial or ascertainable rate by which their value can be determined, as can be done in respect to merchandise generally, was left by the evidence in doubt; the value or price of such works depending, as an experienced artist testified, upon a variety of considerations, some of which were enumerated by the witness, such as the reputation of the artists, &c. With the finding of the court below, therefore, upon such a point, we cannot interfere. The judgment should be affirmed.

ROBINSON, J.—This being an action for the conversion of a painting made by the plaintiff, the knowledge of the wrongdoer of the estimation (*pretium affectionis*) which the plaintiff had placed upon the article, constituted (beyond any opinion of experts as to the market value) a just basis for the judgment below in the plaintiff's favor (Sedg. on Dam. 65, 542). A con-

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trary rule would afford to thieves and wrongdoers a premium for speculating upon a possible verdict of a jury founded upon the opinion of experts or a subsequent sale of the article even, at a sheriff's sale by auction (*Campbell v. Woodworth*, 20 N. Y. 499). Some other basis of value than that was applicable to the article in the hands of the owner.

Judgment affirmed.

JAMES E. HAYES v. HENRY WILLIO.

A contract for the performance of personal duties or services is unassignable, so as to vest in the assignee the right to give directions to, and have control over, the person having engaged to perform the services.

Defendant having bound himself to give theatrical performances for A. at any place A. might direct, for a time certain, and not to perform for any one else, *Held*, that A. could not assign his rights under the contract to plaintiff, so as to give him the right to prevent defendant from giving performances for other persons.

APPEAL by defendant from an order made at special term, denying a motion to vacate an injunction restraining the defendant from engaging to appear and play in any other theatre than that of the plaintiff during the time mentioned in a certain memorandum of agreement entered into between the defendant and Imre Kiralfy.*

Also, appeal from an order denying a motion to vacate a writ of *ne exeat* against the defendant.

The facts of the case were, that Imre Kiralfy being in London, for the purpose of engaging artists for the plaintiff, the proprietor of the Olympic Theatre, New York, the defendant, who was a contortionist, bird imitator, and pantomimist, came to him and solicited an engagement, but was informed by Kiralfy that he had no authority to engage any one in his line for the

* The opinion delivered by the judge at special term on making the order is reported in 11 Abb. Pr. N. S. 167.

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Olympic Theatre, to which defendant responded that in case the management of the Olympic Theatre would not accept his services, he would go in any place of amusement or circus wherever Kiralfy might send him. After some negotiations, an agreement in writing was made between Kiralfy personally and defendant, who thereafter came to this country and gave performances at the Olympic Theatre, but dissatisfaction having arisen, and defendant having refused to perform there any longer, and having entered into an agreement to perform at another theatre, this suit was brought to restrain him from doing so, by plaintiff, who alleged in his complaint that Kiralfy, in engaging defendant, was acting as his agent. The other facts of the case are stated in the opinion.

Chas. W. Brooke, for appellant.

C. F. Wetmore, for respondent.

BY THE COURT.*—ROBINSON, J.—The agreement upon which this action is predicated was made *in terms* between defendant and Imre Kiralfy, as parties, and the case shows it was not executed by the latter as agent of the plaintiff. Upon no legal principle applicable to the law of principal and agent, can plaintiff be held or deemed substituted instead of Kiralfy, as a party to the contract (or entitled to the personal control which the defendant agreed should be exercised over him by Kiralfy *exclusively*), for his performance in any such theatre, circus, or establishment in the United States as the latter might order or direct, with a provision that defendant should perform in no other without his written permission. Plaintiff had not conferred on Kiralfy any authority to make this engagement, and the want of authority being communicated to defendant, he said "if the management of the Olympic Theatre would not accept his services, he would go in any place of amusement Kiralfy might send him," and after some negotiation this agreement was made between them, but as Kiralfy testifies, "with the expectation that the

* Present, DALY, Ch. J., ROBINSON and LOWE, JJ.

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Olympic Theatre (of which plaintiff was manager) would take him off my hands." The defendant accordingly thereafter commenced performing at the Olympic, but from some dissatisfaction left. By the orders appealed from, he has been enjoined from performing at any other place of amusement, and has been imprisoned on a *ne exeat*.

It is evident, from the facts of this case, that the agreement in question was not one made by Kiralfy as agent, but, in view of his want of authority to engage the defendant, and its being problematical whether defendant's services would be accepted at the Olympic Theatre, the contract was distinctly made with Kiralfy individually. Although Kiralfy had no authority to engage artists for the Olympic of defendant's particular class, if the contract had been made solely for the Olympic, subject only to plaintiff's ratification, it might possibly have been sustained as one between him and defendant; but it was one of an entirely different character; it was entirely *executory* and cautiously made *inter partes*, in anticipation of all apprehended contingencies; providing for the *personal* and exclusive control by Kiralfy of defendant's performances at any such place of amusement throughout the United States as he might direct, and for the payment of defendant's salary by him. It had no reference to any delegation of any such control to the plaintiff as the manager of the Olympic, either as principal or assignee, nor to the conferring on him of any of its rights or benefits, nor in any way rendered him liable directly to the defendant for the services defendant performed.

As a general rule, a contract for the performance of personal duties or services is unassignable, so as to vest in the assignee the right to compel its execution (Ch. on Cont. 739; Burrill on Assignts. 67, and cases cited, note 3). As to slaves it is different; but as to apprentices, an assignment of their indentures merely operates as a covenant that they shall serve the assignee (*Nickerson v. Howard*, 19 Johns. 113), except as to the indenture of an infant immigrant to pay his passage, as authorized by 2 R. S. 156, §§ 12, 13, 14; and as to convicts, the right of control still remains in the officer of the State (*Horner v. Wood*, 23 N. Y. 350).

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These considerations do not appear to have been presented on the motion for the orders for the injunction and *ne exeat*, now under review ; they are controlling as to the merits of this controversy, and without discussing the other questions presented on the argument and in the opinion of the judge who granted the orders, these orders should be reversed, with costs, and the *ne exeat* superseded and discharged.

Order reversed.

JOSEPH AGATE v. ABRAHAM LOWENBEIN AND ANOTHER.

A tenant, holding under a lease containing a covenant on his part to quit and surrender the premises at the expiration of the term in as good state and condition as reasonable wear and tear would permit, but providing that he should have the right to make any inside alterations he might think proper, provided they did not injure the premises;—removed the partitions on the upper floors of the leased building, so as to use them for lofts instead of apartments for hotel purposes, *Held*, that this was within the privilege granted him by the lease, unless the pecuniary value of the premises as a whole was thereby injured.

Under such a lease, the remedy of the owner for injury occurring to the property during the term, is confined to such unauthorized and unlawful acts in the nature of waste, as necessarily occasion injury to his reversionary interest.

But the fact that the making of such alterations, changes the state and condition, and for the time being impairs the value of the property, is no ground for an action. It is not intended that the comparison of value to determine whether the alterations injure the premises should be made while the alterations are in progress, but when they are completed.

There is no breach of the privilege conferred, if the premises are restored in an equally valuable condition at the end of the term, and until then the landlord cannot maintain an action.

APPEAL by plaintiff from a judgment entered by direction of the court at trial term, dismissing the complaint.

The facts are as follows :

The defendants were the lessees of the premises, 645, and the three upper floors of 647, Broadway, in New York city, holding under a lease whose provisions are stated in the opinion.

The upper floors of the premises had, when the building

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was originally built, been used as lofts, but shortly afterwards, and at the time of the making of the lease, and when defendants went into possession, they were partitioned off into rooms. Defendants removed these partitions and used the floors as lofts, whereupon this action was brought.

C. Bainbridge Smith, for appellant.

Lauterbach & Spingarn, for respondents.

BY THE COURT.*—ROBINSON, J.—This was an action commenced in December, 1869, against defendants, as assignees of a lease of premises, No. 645, and the three upper floors of No. 647, Broadway, in the city of New York, executed by plaintiff to Eugene Mendez for ten years from May 1, 1866, of which defendants had become assignees in 1866, for injuries to the premises alleged to have been committed by them in 1869, in removing, tearing down, wasting, and destroying the premises. Defendants justified their acts under a provision in the lease, which, after the usual covenant of the lessee to quit and surrender the premises at the expiration of the term in as good state and condition as reasonable wear and tear would permit (damages by the elements excepted), provided that “the party of the second part (shall) should have the right to make *any inside alterations to said premises as he may think proper, provided they do not injure the premises hereby leased.*”

This demise was a vesting of the property and estate in the tenant for the period of the lease, subject only to the payment of the rent and performance of the covenants. The remedy of the owner for injury occurring to the property during the term was confined to such unauthorized and unlawful acts in the nature of *waste*, as necessarily occasioned injury to his reversionary interest.

In this case the tenant was authorized to make such alterations as he might think proper, subject only to the condition that they did not injure the property. This license was not confined to any single effort or experiment, but might be exer-

* Present, DALY, Ch. J., ROBINSON, and J. F. DALY, JJ.

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cised at any time during the term. The very commencement of any such *alteration* of the premises from their then state and condition, necessarily to some extent damaged or destroyed the existing order of things, and would, without such license, technically constitute *waste*; it also, for the time being, impaired the *value* of the property. The construction put upon this latter provision by the plaintiff, as a condition *precedent*, would necessarily prevent the undertaking of any *alterations*, and debar the tenant from any practical benefit from the provision in question. In my opinion, by its true construction, the contract of the parties justified the acts shown to have been done by defendants when the suit was commenced. The character of the alterations to be made were left to the discretion of the lessee, and might have involved entire and radical changes in the internal plan of the building; in the partitions and stairways as well as in many other particulars. It was not intended that such comparison of value as is referred to should be made *in the progress*, but *at the end* of the alterations, and while any such design of the tenant was prosecuted in good faith, he was acting within the scope of the lease, subject only to the "condition subsequent" that such alterations when completed should not "injure (the pecuniary value of) the premises." He was not subject to the obligation of a tenant to keep the premises in repair, who is thereby bound to maintain them continually in such good condition, and for breach the landlord may presently and during the tenancy have his action (*Scheffelin v. Carpenter*, 16 Wend. 409). In the latter case the right in the landlord is to *the maintenance of the freehold* in a particular condition; in the present case the right is one conferred upon the tenant, allowing him to alter the premises at discretion, and is one continuing during the tenancy. There is no breach of the privilege conferred, even if such alterations continue in progress during the entire term, provided the premises be restored in an equally valuable condition as when hired. It was for the interest of the lessee as well as of the lessor, that such alterations should enhance the value of the premises, but the test as to their relative state, or condition, either in view of their productiveness or market value, so far as affecting the *reversionary*

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interest, to which this contract solely relates, must be left for solution until it *legally* come to the reversioner (1 Wash. on Real Prop. 3 ed. 132-3.) Till then the tenant has a *locus pœnitentiæ* to alter and reinstate them in their original valuable condition, and for this reason the landlord in the present case had no cause for complaint for any dilapidation occurring in 1869 in the course of the *alterations* then made by the tenant, nor for any breach of the condition subsequent, that such alterations should not injure the premises, until the termination of the lease. This suit was, however, brought before the termination of the tenancy, and being premature, no damages were recoverable.

For this reason I am of opinion the plaintiff on the trial showed no cause of action, and the nonsuit was properly granted. The judgment should be affirmed.

Judgment affirmed.

SAMUEL BISSICK v. ALEXANDER MCKENZIE AND ANOTHER.

Defendants being indebted to plaintiff on two overdue notes, and also for a balance on a book account, gave a bond and mortgage for the amount of the whole indebtedness. Plaintiff afterwards assigned the notes, and in a suit by his assignee, of which suit plaintiff had notice, and in which he was a witness, defendants having gone to the jury on the question whether the bond and mortgage had been accepted in payment, the jury found that they had not, and defendants had judgment against them.

In a subsequent suit by plaintiff on the book account, defendants set up that it had been paid by the bond and mortgage; *Held*, that on this question the judgment in the previous suit was conclusive.

Plaintiff being liable on the notes to his assignee, as warrantor, the judgment in the former action, if it had been against his assignee, would have been conclusive on him in this action, and on the principle of mutuality of estoppels, it should be binding on the defendants also.

APPEAL by plaintiff from a judgment of the general term of the Marine Court, affirming a judgment entered on the report of a referee. The facts are as follows :

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On March 20th, 1862, the defendants were indebted to the plaintiff in about the sum of \$609 75. Of this amount \$206 22 was for the balance due on two overdue notes of defendants, held by plaintiff, and the remainder of the indebtedness was a balance of a book account for goods sold. On that date the plaintiff and defendants adjusted the accounts between them at the above-mentioned sum, and the defendants gave the plaintiff a bond and mortgage on real estate in Brooklyn.

After that date the plaintiff transferred the overdue notes, part of such indebtedness, to one Pinner, and Pinner sued the defendants thereon in the Supreme Court. In that action the defendants defended on the ground that the notes, with the balance of the book account, had been paid in full by the bond and mortgage aforesaid. The issue was tried before a jury, who, upon [submission to them of the question whether this plaintiff, Pinner's assignor, had received the bond and mortgage in payment, found by their verdict he had not, that the notes were unpaid, and judgment was thereupon entered up in favor of Pinner (the plaintiff in that action) for the balance due on the notes as stated in the account of March 20th, 1862, between the plaintiff herein and the defendants.

This plaintiff then brought this action against the defendants for the balance of the indebtedness in the account of March 20th, 1862, being the balance due for goods sold. In this action the defendants pleaded payment by the bond and mortgage. The referee found there had been a settlement and payment on March 20th, 1862, the only evidence thereof being the entry in defendants' pass book, signed by plaintiff "Received payment in full for all demands to date by mortgage."

H. Brewster, for appellant.

F. Smyth, for respondents.

BY THE COURT.*—J. F. DALY, J. [after stating the facts].—The question before us is whether the judgment in the action of Pinner against these defendants, which the plaintiff put in

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ.

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evidence on the trial before the referee, is a bar to the defendants' plea of payment by the bond and mortgage aforesaid in this action.

That issue was fully and fairly tried in the Pinner suit, and was the sole issue the jury had to pass upon. It was properly tried therein because Pinner took the notes after maturity and was subject to the equities existing in favor of defendants against his assignor, this plaintiff. It was the trial, in fact, of all the equities between this plaintiff and these defendants, growing out of the transaction of March 20th, 1862. This plaintiff was a witness in that action in favor of Pinner, and these defendants were witnesses on their own behalf. The notes of Pinner and the balance for goods sold now sued for by the plaintiff were part of the one account stated and found to be due plaintiff on March 20th, 1862. The plaintiff could have sued on the whole as one cause of action, and in point of fact the whole cause of action was litigated in the suit of Pinner, and the policy of the law is that the same cause of action ought not to be brought twice to a final determination. It is also said that "Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that having been once so tried all litigation of that question and between those parties should be closed forever. It is also a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true that by proceedings to which he was not a stranger he may well be bound" (1 Greenl. on Ev. 522).

It is also said, that *parties* includes in this connection all who are directly interested in the subject-matter, and had a right to control the proceedings and appeal from the judgment. This plaintiff, as assignor of Pinner of the overdue note, was liable to Pinner, as a warrantor, if the defendants had succeeded in their defense of judgment (*Delaware Bank v. Jarvis*, 20 N. Y. 226; *Fake v. Smith*, 7 Abb. Pr. R. N. S. 106).

Pinner could have put the judgment against him in evidence against the plaintiff, who would have been concluded by it, the plaintiff having notice of the suit, and being a witness on the trial of it (*Fake v. Smith*, 7 Abb. P. R. N. S. 119).

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The privity between this plaintiff and Pinner, the plaintiff in the suit in the Supreme Court, and their joint interest in that suit are apparent when we consider that if the mortgage were given as collateral security, Pinner, as assignee of the note, became jointly interested with this plaintiff in that security, and the litigation between Pinner and the defendants put in issue the whole transaction.

Pinner and the plaintiff were identified in interest, and being in privity with him, would be bound under the general rule, and estopped from litigating the same matter with the defendants in another action. The essence of an estoppel being mutuality, it follows that the defendants were bound towards the plaintiff by the judgment against them in the action of Pinner. They have had their day in court.

For these reasons, I think the finding of the referee erroneous, and that the judgment should be reversed.

Judgment reversed.

HENRY E. COOK AND ANOTHER v. ELIZABETH KROEMEKE.

In an action by real estate brokers, for commissions, the plaintiffs have made out a *prima facie* case when they have proved the introduction, by them, to defendant of a person willing to purchase on the terms at which they have been authorized by defendant to sell.

It is not necessary for them to prove, in the first instance, that the person introduced was of sufficient pecuniary ability to pay the price. On this question, the burden of proof is on the defendant to prove the contrary.

Nor is the broker obliged to cause the party willing to purchase to tender to the seller a written agreement to that effect.

APPEAL by plaintiffs from a judgment of the 7th District Court, dismissing the complaint. The facts are stated in the opinion.

A. B. Clarke, for appellants.

J. E. Berry, for respondent.

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BY THE COURT.*—JOSEPH F. DALY, J.—The plaintiffs were real estate brokers, and were employed by the defendant to sell the house and lot, No. 341 West 54th street, at the price of \$7,250. They found and produced to her two persons successively, who were willing to purchase on her terms, but she declined to execute a contract of sale, or to sell the property. These facts were proved at the trial by the plaintiff, Cook, and by Michael Duly and John Gillford, the two persons who were willing to become purchasers. Duly presented to her a contract, which she refused to sign, but no reason appears to have been given for such refusal. In Gillford's case, she appointed a time to meet him at the plaintiffs', and although he was there, she failed to appear, but no reason for her not attending appears in evidence. Without giving any evidence whatever, either as to her reasons for not accepting either Duly or Gillford, or for not selling to them, or to any other effect, defendant, at the close of plaintiffs' testimony, moved to dismiss the complaint on the grounds: 1st, That plaintiffs had not proved the introduction of a man of sufficient pecuniary responsibility to the defendant; 2d, That the contract submitted to defendant was not one that could be enforced in a court of equity. The Justice thereupon dismissed the complaint, rendering judgment therefor against the plaintiffs in favor of defendant.

The justice erred. The first ground on which defendant moved to dismiss was not well taken. It was for defendant to prove, on the trial that the persons introduced to her as purchasers were not able, pecuniarily, to pay the price they agreed, or were willing to contract to give. Until that was shown they are each presumed to be solvent and able to pay what they expressed a readiness to pay (*Hart v. Hoffmans*, Ct. Appeals, June, 1871).

The second ground of motion to dismiss was not well taken. It was not the broker's duty to present a purchaser with a contract ready drawn and executed to tender to his principal. It is enough, that under the terms of his employment by his principal he produces a person able and willing to take the prop-

* Present, DALY, Ch. J., ROBINSON and J. F. DALY, JJ.

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erty and pay the price on the vendor's terms. No contract was presented by Gillford to the defendant nor tendered him by her. The burden was on her to show why she refused to keep her appointment with him. The brokers appear to have performed their duty (*Barnard v. Monnot*, 1 Abb. Ct. App. Dec. 108; s. c., 3 Keyes, 204; *Moses v. Birrling*, 31 N. Y. 464).

The judgment should be reversed.

Judgment reversed.

MARY CAREY v. THOMAS W. CAREY.

Where an appeal is based on the ground of an improper rejection of competent testimony, the case must show clearly that there was an exception taken to such rejection, or that the appellant was injured thereby.

It seems, that since the act of 1867 (L. 1867, ch. 887), husband and wife are (in a suit for limited divorce) as competent to give evidence in their own behalf as any other witnesses. Per ROBINSON, J.

APPEAL by defendant from a judgment entered on the verdict of a jury.

This was an action for a limited divorce tried at special term in January, 1871, before a judge and jury.

On the trial the plaintiff was offered as a witness in her own behalf, and testified as to acts of cruelty on the part of defendant. At the close of the plaintiff's case, the defendant was offered as a witness in his own behalf, and what took place is stated by the case on appeal as follows :

"Plaintiff's counsel.—I object to the defendant testifying in his own behalf. I confined all my questions to what occurred when the husband and wife were alone together.

"Court.—I shall confine the defendant's testimony strictly to those facts testified to by the wife, where he and she were alone together.

"Objection allowed, and exception taken."

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John Townshend, for appellant.

Chas. E. Whitehead, for respondent.

BY THE COURT.*—DALY, CH. J.—It does not appear from the case as settled, that the defendant took any exception to the ruling that his testimony would be confined to what occurred between himself and his wife when alone together. The only objection made was by the plaintiff when the defendant was offered as a witness upon his own behalf, and all that appears in the case is, “objection allowed, and exception taken.” What objection was allowed? Not that the defendant was permitted to testify in his own behalf, for the objection was not allowed, as he was permitted to testify in his own behalf. Was an objection made by the defendant to the limitation of the defendant’s testimony by the ruling of the judge? If it were, it does not appear in the case, which refers to an exception taken to an objection which was allowed by the judge. It does not therefore clearly appear that the defendant took any exception, or whether it was he or the plaintiff that took an exception to the allowance of an objection, or what the objection was that was allowed. The defendant offered no testimony upon which to get a ruling by the court, nor did he put any question which the court excluded, to show us that he was injured by the exclusion of testimony which he was entitled to give, and which he was prevented from giving by the decision of the court. Unless he can show us upon this appeal how he was injured and in what the error of the court consisted, we cannot reverse the judgment and give him a new trial (*Graham v. Dunigan*, 2 Bosw. 521, 522.)

ROBINSON, J. (dissenting).—This action was instituted to procure a limited divorce or separation from bed and board, on the ground of cruel and inhuman treatment. The allegations of the complaint were denied, and on the trial in January, 1871, before a judge and jury, plaintiff was called as a witness on her own behalf, and testified in very general terms to acts

* Present, DALY, Ch. J., ROBINSON and J. F. DALY, JJ.

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of violence and ill-usage on the part of defendant, her husband, when they were alone together, also to various circumstances connected with the merits of the case, not relating to acts transpiring when they were alone together. Other witnesses were called on her behalf, who gave testimony as to such ill-usage. When the plaintiff rested, the defendant was called as a witness on his own behalf. Plaintiff's counsel objected to his so testifying on his own behalf, stating that he had confined all his questions to what occurred when the husband and wife were alone together. The judge states, "*I shall confine the defendant's testimony strictly to those facts testified to by the wife when he and she were alone together.*" Objection allowed, and exception taken."

The objection was general as to defendant's competency as a witness, and the fair interpretation of the decision is, not that the broad objection was allowed, but that the defendant was competent to testify to matters *that had occurred between him and plaintiff and as to which she had testified*; but beyond that was incompetent, and the "objection allowed."

Defendant's examination was confined within these limits.

In this the judge erred. Previous to the act of 1867, chap. 887, much difference of opinion had existed as to the construction of § 399 of the code, and its various amendments of 1859, '60, '62, '65, and '66, allowing a party to an action to be examined in his own behalf, "the same as any other witness," as to whether it had modified the rules of the common law prohibiting husband and wife from being witnesses for or against each other, and arguments were mainly predicated upon the question whether or not the legislature, by the use of such general terms, contemplated and included the marital relation. The amendment of 1860 seemed to answer that question, by providing that "neither husband or wife should be required to disclose any communication by the one to the other." This provision was, however, excluded from the section as amended by the act of 1862 (*Moffat v. Mount*, 17 Abb. Pr. 6), as well as from its amendments in 1863, '65, '66, '67, and '69.

Rule 88 of the Supreme Court, adopted to take effect October 1, 1858, allowed the examination of the plaintiff as a

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witness in an action of this character, on a reference on default to take proof of the facts charged, as to any of the acts of cruel or inhuman treatment, which took place when no witnesses were present, who were competent to testify to the facts, on such reference. Beyond this there was no innovation upon or relaxation of the rule of the common law until the act of 1867. There had been conflicting decisions upon this question (see *P. v. P.* 24 How. Pr. 197; *Bihin v. Bihin*, 17 Abb. Pr. 28; *Aiken v. Baumann*, Id. 28, in note). The act of 1867, entitled "An act to enable husband and wife, or either of them, to be witnesses for or against the other, or on behalf of any party in certain cases," solved the difficulty. It enacted (so far as it relates to this question, in an action for a mere *limited divorce*), that "in any trial, * * the husband or wife of any party thereto * * shall (except as hereinafter stated), be competent * * to give evidence the same as any other witness on behalf of any party to such suit." This statute is independent of the code, and has reference only to witnesses holding the relation of husband and wife. It would prevail if the provisions of the code were abolished, and would only be controlled by the general rules applicable to "other witnesses." The stringent rule adopted (under exception) at the trial improperly circumscribed the competency of the defendant as a witness generally, to any facts material to the issue, and restrained him in that respect, not only to matters occurring between him and his wife when alone together, but also to those as to which she had testified.

I do not think that, after such a ruling and decision, it was necessary for the defendant to propose specific questions outside of the limit thus imposed, in order to render available the distinct exception he had taken. The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Judgment affirmed.

Barker v. The Hudson River R. R. Co.

WILLIAM BARKER AND ANOTHER v. THE HUDSON RIVER R. R. Co.

A railroad company which is permitted to lay its tracks through a public highway, is not subject in the running of its cars to the ordinary law of the road. It has exclusive right of way to that portion of the highway occupied by the tracks, and a truck or cart passing along the highway must turn out of the way for its cars, and the drivers of them cannot call upon the driver of the railroad company's car to stop, or do any other act to avoid a collision, if the same result can be attained by their turning out.

The plaintiffs' truck was being driven along between the curbstone of the sidewalk and the rail of defendants' track, and the driver saw defendants' car coming along drawn by horses, and another truck next to the curbstone and between himself and defendants' car, and seeing that there would not be sufficient room for the two trucks between defendants' car and the curbstone (he being then 60 or 70 yards distant from the car, and having plenty of room to turn out and cross to the other side of the street where he would be out of danger), called to the driver of the car to stop, which defendants' driver failed to do, and both continuing to proceed, plaintiffs' horse and truck were caught between the car and the truck next to the curbstone, and were injured; *Held*, that the plaintiffs could not recover.

APPEAL by the defendants from a judgment of the general term of the Marine Court, affirming a judgment entered on the verdict of a jury at trial term.

Action for negligence. The facts are stated in the opinion.

———, for appellants.

Walter S. Poor, for respondents.

BY THE COURT.*—ROBINSON, J.—It seems clear to me that the judgment appealed from in this case should be reversed. Defendants, a railroad corporation having legal authority, located and ran upon, railroad tracks in and through West street, in this city, consisting, at the place where the accident in question occurred, of two main tracks, and a side track on the west side of the street, between four and five feet from the curbstone. The easterly of the two main tracks is twelve or fourteen feet from the curbstone on that side of the street. On the day of

* Present, ROBINSON and LOEW, JJ.

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the occurrence, plaintiffs' cartman was driving their horse and cart in a southerly direction along West street, and at the distance of sixty or seventy yards, saw a freight car of defendants' drawn by four horses, coming up on the easterly track, and also a cart loaded with pig iron coming up between that track and the curb, and fearing a collision, hailed the driver of the car to stop, but says his hail was disregarded, and adds, "I did not stop when I heard the other cart. I did not stop *because I had time enough to get away*, and because I was too near the other cart." He drove on and met the other cart (to the east of him) just as the freight car came along; the front truck of the car passed without injury, but the side of the car just before the middle door, struck or was struck by the cart or horse as the front wheel of the rear truck came along; it ran over the foot of plaintiffs' horse, broke the harness and injured the cart. Each of the carts was eight feet wide, and there was not room enough between the railroad car and curb for them both to pass the car side by side. Plaintiffs' right of recovery must be founded in their showing the absence of any want of care on their part, and that the injury was occasioned by the neglect of the defendants. It was stated on the trial that the rail of the side track was a "peculiar one, and wagons could not go over it with safety;" "neither carts or wagons ever use that side of the street in consequence;" "it is impossible to do so without great danger of an upset;" but as to the westerly main track, or the space between it and that side track, there does not appear to have been any such difficulty, or that it or the street between was obnoxious to any "danger of an upset," as was shown to pertain to the side track.

The front four wheels or truck of the freight car having passed the plaintiffs' cart and horse without injury, before the rear truck came along, something occurred by which the horse and cart were forced in upon the easterly rail as the car was passing, in consequence of which the horse's foot was caught under the front wheel of the rear truck and torn off, and other injury occasioned to the harness and cart. From these facts it is manifest that the injury arose from one or both of the carts continuing their course, in the attempt to crowd past each other,

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in such a narrow and dangerous position, alongside of a passing freight car, whereby plaintiffs' horse and cart were thrown against the car and the injury complained of, inflicted, and I am unable to discover any ground for holding the defendants responsible for it. To expect them to stop their heavy freight car, upon the driver or manager being hallooed to, at the distance of 180 or 210 feet, or to require them to anticipate and guard against the difficulty the driver of the plaintiffs' cart alone apprehended, or that he, apprehending it, should still continue to face it, or that they should suppose he would not stop on the spot where he was safe, and could warn the other approaching cart, or that he should fail "to turn to the right" and drive over to the west of the easterly track, on to the main westerly track, or the portion of the street west of the track on which the freight car was approaching, were all unreasonable exactions. The plaintiffs' cartman was bound "to yield the track" to defendants' freight car, as the defendants had the right to its exclusive use, while their car was passing (*Hegan v. Eighth Av. R. R. Co.* 15 N. Y. 380). In the exercise of their own rights they were bound to such reasonable care to prevent the injury, as was at their immediate command, to avoid the apprehended difficulty. But they were authorized to rely on the presumption, that plaintiffs' cartman would act in accordance with their rights, and keep clear of their track so as to allow their car to pass, and as he saw the car coming when at such a remote distance, his neglect for all the time required for both vehicles, the car and cart, to come together, within the space of 180 or 200 feet, the apprehension of his neglecting to drive off the track could scarcely have been entertained by defendants' agents. "Still, if they offended in that respect, and the driver of a common carriage will negligently or wilfully place himself or remain on their path, he has no right to claim damages" (*Hegan v. Eighth Av. R. R. Co. supra*).

Plaintiffs' case seems at most to be founded upon an attempt to assert against the defendants the ordinary rules of "the law of the road," without regard to the special privileges and franchises which the Legislature have conferred on this

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railroad corporation for the benefit of the public at large, although to the temporary inconvenience of individuals. This rule of equal rights and privileges is, in this respect, innovated upon, for what is deemed to be the public good; and plaintiffs' cartman was bound to have respected them, to have kept off at such safe distance from the track as to allow the car to pass. Instead of availing himself, however, of the long distance of time for choosing a safe position, "having (as he says) time enough," made no such attempt, but heedlessly drove on, and attempted to pass between the other cart and the car, when opposite each other, and, as it seems to me, not only contributed, but was mainly instrumental in producing the damage in question.

The judgment should be reversed.

Judgment reversed.

PATRICK MURRAY v. CHANDLER SMITH AND OTHERS.

No particular words are necessary to constitute a warranty. A representation or any positive affirmation of the state, quality, condition or fitness of the thing sold, which may be supposed to have entered into the consideration of the sale, showing an intention to warrant, and which was so understood and relied upon by the purchaser, will amount to a warranty.

Whether what passed between the parties, amounted to a warranty, or was merely a recommendation or an expression of opinion, is a matter for the determination of the jury, unless the language used has a fixed or technical meaning.

But where there is some confusion or misunderstanding between the parties as to whether the property was warranted as a certain thing, or of a certain quality, the understanding of the parties, on the intent, must be left to the jury, and they are to say as to whether there was a warranty of the goods as fit for a certain purpose, or as of a certain quality.

Where goods are sold to be used for a certain purpose, and they are found by the purchaser to be unfit for such purpose, he is not obliged to return them, but may have his remedy by an action for the breach of the warranty or recoup his damages in an action brought for the price.

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All that is ordinarily implied by the exhibition of a sample is that it has been fairly taken from the bulk, but any representation that the bulk is equal to the sample may amount to an express warranty.

A broker having power to sell, may, unless he be specially restricted from doing so, sell with a warranty as to the quality of the article sold, or as to its fitness for a particular use.

Plaintiff sold to defendants by sample, certain barrels of lamp-black, with a warranty that all the lamp-black would come up to the sample shown, which had been taken from one barrel, and also with a warranty that the lamp-black was fit for making printers' ink. After the goods were delivered to defendants, they examined them and found that the barrels did not all come up to the sample, and plaintiff made a reduction in the price. Afterwards defendants discovered that the lamp-black was not fit for making printers' ink, and in a suit for the price set up a breach of warranty; *Held*, that although by agreeing to take the goods at the reduced price, defendants had waived their right to set up that the goods did not correspond with the sample, yet that they were not prevented from setting up the breach of the warranty that the lamp-black was fit for making printers' ink.

APPEAL by plaintiff from a judgment entered on the verdict of a jury.

Action for goods sold and delivered. Defense, a breach of warranty as to the quality of the goods sold, by which they were rendered totally useless to the defendants. Defendants had a verdict in their favor. The facts are stated in the opinion.

R. L. Scott, for appellant.

G. A. Seixas, for respondents.

BY THE COURT.*—DALY, CH. J.—This verdict cannot be disturbed. The judge told the jury that "where there is some confusion or misunderstanding between the parties as to whether the property was warranted as a certain thing, or of a certain quality, the undertaking of the parties, or the intent, must be left to the jury and that they are to say as to whether there was a warranty of the goods as fit for a certain purpose, or as of a certain quality." After this general observation he left it to the jury to say whether the lamp-black was warranted as fit to be used for printers' ink or not, and as they found for the defendant, we must assume, in support of their verdict,

* Present, DALY, Ch. J., and LARRENORE, J.

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that there was such a warranty. As there was conflicting testimony in the case, we must also assume, in support of the verdict, that the jury found the facts to be as stated by the defendants' witnesses, and upon this assumption, there was sufficient in the case, as presented by the defendants' witnesses, to entitle the judge to leave it to the jury to say whether there was a warranty or not. As a general rule, the finding of the jury upon the question whether there was or was not a warranty, will not be disturbed, even where there was no contradiction among the witnesses as to what occurred, if the point is at all doubtful or uncertain.

No particular words are necessary to constitute a warranty. A representation or any positive affirmation of the state, quality, condition or fitness of the thing sold, which may be supposed to have entered into the consideration of the sale, showing an intention to warrant, and which was so understood and relied upon by the purchaser, will amount to a warranty. This is of course distinguishable from a mere recommendation of the article, or the expression of an opinion respecting it, or the innumerable things that a vendor will say to enhance the value of his commodity and induce the sale of it, such as its cheapness, excellence, &c., for then the buyer understands that he must examine and judge for himself and not that he is buying upon an express undertaking upon the part of the seller that the article is of a certain kind, or fit for a certain use, and that he will be responsible for any loss or injury that may arise if it should not be. (See the cases collected in Hilliard on Sales, p. 341, 3d ed.) Whether what passed between the parties amounted to a warranty, or was merely a recommendation, or an expression of opinion, is a matter for the determination of the jury, unless the language used has a fixed or technical meaning. This has been repeatedly held (*Duffee v. Mason*, 8 Cow. 26; *Whitney v. Sutton*, 10 Wend. 413; *Blakeman v. Mackay*, 1 Hilt. 266; *Rogers v. Ackerman*, 22 Barb. 134), and it is especially for the jury, in cases like the present, where the point is doubtful or uncertain.

The plaintiff's agent, who is a broker, had sold the defendants some lamp-black, which proved to be very good. He came

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again and told the defendants that he had another lot to sell which a party had, who represented it as better than the previous one. He said that the party had examined the sample, and that it was a superior lot to the one which had been sold to the defendant before, and that he thought that he could sell it at about the same price. The defendants told the broker that he must be very particular in having black that would make printers' ink, the defendants being manufacturers of printing ink; that black for carriage work would not answer; that he must have lamp-black for printing ink. The broker then said that he would bring a sample of it, and the defendants told him to bring a sample from every cask. He brought, however, but one sample, saying that *it was all the same*, and *would come up to that sample*; which, according to the testimony of the manufacturing chemist in the defendants' establishment, was good lamp-black, pure, and without any grit in it. The defendants asked if it was fine black for printers' ink, and the broker answered that the parties knew better than he did in respect to that, but it was recommended from them as black for making printers' ink. The defendant testified "He," the maker, "handed to me but one sample, and sold it, I believe, to me on that sample, *as being all the same*. He sold it to me to make printers' ink of; that was the very purpose I bought it for. I told him so expressly, and agreed with him to pay fourteen cents a pound for that black, *according to that sample*." It further appeared that the defendant said to the broker that he did not want any lamp-black at that time; that he would not want to make it into ink for two months; that the broker answered that the defendant might make some arrangement about the time, that he could have a bargain of it, and the sale was accordingly made upon two months' credit.

The broker testified that he did not guarantee it, that he was not asked to; that he knew nothing of lamp-black, or whether it was good for any purpose or not; that he knew the business that the defendant was in; knew that the defendant wanted it for printers' ink, that that was implied of course; that the defendant told him that he wanted it to make printers' ink of; and that he sold it to him for that purpose. The fol-

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lowing question was put to him : “ You were authorized by the plaintiff to give it to him for that purpose,” and he replied that when the plaintiff found that he had sold his lamp-black to the defendant, the plaintiff said to him, sell mine ; that in the transaction he was the plaintiff’s broker ; that as he understood it, it was a sale by sample, and was sold for *printers’ ink as he understood it*. He also testified that the plaintiff gave him the sample of the lamp-black, and that he gave the sample to the defendant to see if he could use it for ink.

All that is ordinarily implied by the exhibition of a sample is that it has been fairly taken from the bulk, and in a sale made simply by the exhibition of a sample, the vendor is not responsible for latent defects. Having taken the sample fairly from the bulk, the buyer is assumed to be as competent as the seller to judge of the merits, quality or value of the article, and if, under such circumstances, he buys simply upon the inspection of the sample, he takes the risk, and can make no reclamation thereafter upon the buyer. But in this case there was something more. The defendant wanted a sample from every cask, but the broker brought but one, declaring that it was all the same ; that it would come up to that sample, and the defendant, as he testified, bought it according to that sample, saying in addition that the broker, as he believed, sold it to him on that sample, as *being all the same*. This places the transaction in a very different aspect, for any representation or express affirmation, as was said by Paige, J., in *Hargous v. Stone*, 2 Seld. 85, that the bulk of the commodity sold is equal in quality to the sample exhibited, or that the sample is a true specimen of the bulk, presents the question of an express warranty, and it is very plain upon the evidence, that there was a warranty that the bulk of the commodity was equal to the sample, which it certainly was not, the evidence upon that point being clear and conclusive.

If this were all there was in the warranty, the verdict could not be sustained, for the parties subsequently modified the contract in this respect. A week or ten days after the delivery of the twenty-one barrels of lamp-black, a cursory examination of them was made by a person in the defendants’

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employment, and it was found that they varied very much. This examination was made by boring a hole in each barrel and taking out some of the lamp-black from each, and it was found that the barrels were of different qualities, and that upon the whole, what was delivered did not come up to the sample.

This was represented to the plaintiff; a proposition was made to him by the defendant to make a reduction of four cents a pound upon seven of the barrels, to which he assented, and a new bill was made out in which this deduction was allowed. This must be regarded as an agreement to abrogate the warranty, that the bulk corresponded with the sample, in consideration of the reduction made in the price of the seven barrels, but it did not necessarily abrogate the additional warranty that the commodity sold would make printers' ink, or (as we must assume the jury found under the judge's charge) that it was fit for that purpose, if there were such a warranty.

This, upon the evidence, was much more doubtful. It is, perhaps, questionable whether what was said upon the subject amounted to anything more than the expression of an opinion. The broker said that the parties knew better than he did, and that it was recommended from them as black for making printers' ink; but when that is taken in connection with the defendant's statement to the broker, that he must be very particular in having black that would make printers' ink; that black for carriage work would be of no use; that he must have lamp-black for printing ink; that the broker knew that he was a manufacturer of printers' ink; that he told the broker that that was the very purpose for which he bought the lamp-black, and his statement that the broker sold it to him to make printers' ink of it, coupled with the broker's own statement that he sold it for printers' ink *as he understood it*; that the plaintiff was a dealer in the article, and was for twenty years a judge of lamp-black; that to open and examine the barrels thoroughly from bottom to top would have involved trouble and expense, and as the defendant did not want to use it for two months, would have injured it, as in such case it would accumulate matter; and finally, that there are qualities that cannot be ascertained by prior examination, or known,

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until it is made with ink, and that the only sure way to ascertain the quality of this lot was to use it; when I say all this, which was in evidence, is considered, it involves a doubt whether there was or was not a warranty that it was fit for this purpose, so as to make the question one exclusively for the jury. "The words used," says Sutherland, J., in *Duffee v. Mason*, 8 Cow. 26, "may amount to a warranty or may be matter of opinion merely; and it is for the jury to determine from all the circumstances of the case, *how they were understood and intended by the parties*. * * * The understanding of the parties to a contract of this nature, where the language used by them has no fixed or technical meaning, is a matter for the determination of the jury," and the present case is a good illustration of the propriety of the rule there laid down and followed in the subsequent cases that have been quoted.

The jury have found that there was such a warranty, and this conclusion on their part is final, and cannot be reviewed. When the agreement was made to deduct a certain sum from the price of seven barrels, because what was delivered was not equal to the sample, the fact was not known, that the article was not fit to make printers' ink. As the defendant apprised the broker when he bought it, that he had no occasion to use it for two months, it was not for the plaintiff to complain that that length of time transpired before the defendant ascertained its unfitness when he attempted to use it. Moreover, if there was a warranty of this nature, he was under no obligation to examine and return the lamp-black within a reasonable time. He might do so if he thought proper, and by so doing discharge himself from the payment of the price; or he might keep the property, and have his remedy by an action for the breach of the warranty, or recoup his damages in an action brought for the price (*Stroud v. Pierce*, 6 Allen, 413; *Fielder v. Starkin*, 1 H. Bl. 17; *Buchanan v. Parnshaw*, 2 T. R. 745; *Fisher v. Samuda*, 1 Camp. 190; *Dukes v. Nelson*, 27 Ga. 457; Hilliard on Sales, 374, 3d ed.). There was no waiver, therefore, of this warranty, by agreeing to abrogate the warranty that the bulk corresponded with the sample, as the defendant did not then know that there was or would be any

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breach of the additional warranty that it was fit to make printers' ink. When he discovered such to be the fact, he promptly advised the plaintiff that his workman had reported to him that the lamp-black would not work into ink, owing to a mixture of something that was in it, and that it had done a great deal of mischief. He brought his workman to the plaintiff to explain it to him, and the defendant said if that was the case, he would not want anything. The defendant proposed that the plaintiff should send an expert to the defendant's factory to examine the lamp-black and the ink made from it, and that whatever was decided by the expert sent by the plaintiff he (the defendant) would abide by it. That if the expert decided that the defendant's statement was wrong, he would keep the lamp-black and pay for it; and if he decided that the statement he made was right, he would return it. The plaintiff accepted the proposition, a day was fixed by him when he was to send the expert, and the defendant's workman waited at the factory to give the explanation; but the plaintiff's expert never came; so that, if the lamp-black was not returned, it was not through any fault or unwillingness on the part of the defendant.

That it was not fit to make printers' ink was sufficiently established by the defendant's evidence. Indeed, there was no contradiction in the testimony upon that point. The manufacturing chemist employed in the defendant's factory testified that it could not be made into printers' ink, and *was worth nothing for that purpose*. That he had to use three times as much of it as of the lamp-black previously used, and then the ink was thin, had not the same body, and the color was bad. That, in grinding it, a great deal of grit was found in it, so that what was ordinarily done in four hours, took the whole day. Some of the ink made from it was sent to a printer who used a great deal of ink, and it proved to be so bad and did so much injury to the printer, that the defendant lost his custom; in addition to which, the defendant sustained considerable damage by the loss of labor and by the loss of the materials compounded with it. In fact, the evidence established that for the purpose for which the defendant bought it, it was to him of no

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value whatever; and this being the evidence, the jury found a general verdict for the defendant.

Numerous exceptions were taken by the plaintiff to the admission and rejection of testimony and to certain parts of the judge's charge. I have gone over all of them, and do not find any error that would entitle the plaintiff to a new trial. The broker had power to sell, and as it was not shown that he was under any restriction, he might sell with a warranty as to the quality of the article, or as to its fitness for a particular use (*Andrews v. Kneeland*, 6 Cow. 354). The judgment should be affirmed.

Judgment affirmed.

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By the terms of a policy of life insurance it was provided that the proposals, answers and declarations of the assured should be made a part of it "as fully as if they had been therein recited," and it was further declared in the policy that if they should be found in *any respect* false or fraudulent, that then the policy should be null and void. In the series of questions thus annexed to and forming part of the policy, was one propounding the inquiry whether the assured had ever had certain specified diseases, and if so how long, and to what extent, among which were enumerated spitting of blood and diseases of the lungs, to which the assured answered in writing, "No." At the end of the series of questions was a declaration subscribed by the assured, stating that the answers given were correct and true, and that the statements made by him should *form the basis of the contract* of insurance, and also that any untrue or fraudulent answer or any suppression of facts in regard to his health should render the policy null and void. The insurance was effected in January, 1867. It appeared that in November, 1865, he had a slight hemorrhage which lasted on and off for two days. That in March, 1866, he had another hemorrhage, which lasted nearly *ten* days, during which he raised blood twice a day—morning and evening—and was from the effects of this hemorrhage confined to his bed several weeks, and it was about a month before he was able to go out in the open air. That during the first hemorrhage he spit blood more than ten times, and that he thought the spitting of blood during both attacks came from his lungs. He

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had another attack of hemorrhage in August, 1868, and in September, 1869, died of consumption; *Held*, that the answer of the assured that he had never had a disease of the lungs or spitting of blood was untrue, and avoided the policy.

In an application previously made for an insurance upon his life to another company, the assured had made known to the agent of that company (who was the medical examiner in this application) that he had had two attacks of spitting of blood; *Held*, that this did not change the effect of the untrue answer.

The answers were warranties, and any one of them being untrue there was a breach of the warranty upon which the insurance was made, and which rendered the policy void.

The judge at the trial charged that the answers were warranties to some extent, and if any answer was untrue and was *known to be untrue* at the time it was made, the warranty was broken, and the policy was vitiated; *Held*, that this was error.

The provision in the policy that if the answers, &c. should be found in any respect false or fraudulent, the policy should be void, was not a waiver or merger of the previous provisions in respect to the truth of the answers, nor prevent them from being warranties.

To prove the falsity of a statement it is not necessary to prove that it was knowingly or intentionally false.

APPEAL by defendants from a judgment entered on the verdict of a jury. The facts are stated in the opinion.

T. R. Strong, for appellants.

R. E. & T. Foot and *James Emott*, for respondent.

BY THE COURT.*—DALY, CH. J.—A new trial would have to be granted in this case upon several grounds. It is not necessary now to recapitulate them, as we expressed our views very fully upon the argument, and it will suffice now to state one ground that is fatal to the plaintiff's action.

By the terms of the policy, the proposals, answers and declarations of Major Foot were made a part of it "as fully as if they had been therein recited," and it was further declared in the policy, that if they should be found, *in any respect*, false or fraudulent, that the policy should be null and void.

In the series of written questions thus annexed to and form-

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

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ing a part of the policy was one propounding the inquiry whether he had ever had certain specified diseases, and if so, how long and to what extent, among which were enumerated spitting of blood and diseases of the lungs; to which Major Foot answered, in writing, "No." At the end of the series of questions was a declaration, subscribed by him, stating that the answers given were correct and true, and that the statements made by him should *form the basis of the contract* of insurance, and also that any untrue *or* fraudulent answer, or any suppression of facts, in regard to his health, should render the policy null and void.

The insurance was effected in January, 1867, and it was shown, upon the trial, that he was wounded twice while in the army, that on his passage from New York to California, in November, 1865, he had a slight hemorrhage which lasted, "on and off," for two days, and, upon his arrival at Aspinwall, had to be carried on a stretcher from the steamer, to be carried in a like manner from the cars at Panama to the steamer on the Pacific side, and was not able to go with his company to Arizona. That in March, 1866, he had a hemorrhage at his barracks in California, which lasted nearly ten days, during which time he *raised blood* twice a day, morning and evening, and was, from effects of the hemorrhage, confined to his bed several weeks, and it was about a month before he was able to go out in the open air. That during the first hemorrhage he spit blood more than ten times; that in his opinion it came from his lungs, and that he did not recover entirely from the attack before he had the second attack. That the spitting of blood, during the second attack, lasted about ten days, that he was confined to his bed about a month, that he thought the spitting of blood proceeded from his lungs, that he had a cough before the first attack, a cough for *two* years after the second attack, and that the second attack was much more severe than the first. It further appeared, that he had another attack of hemorrhage in August, 1868, and that in September, 1869, he died of the disease of consumption.

This evidence, which was uncontradicted, shows that his answer, that he had never had a disease of the lungs, or spitting of

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blood, was untrue. It established that he had had a severe attack of spitting of blood within ten months of the time when the insurance was effected, which had been preceded by a prior attack. Indeed, the evidence showed conclusively that he had had a disease of the lungs before the insurance, and as he had a cough for two years after, another attack of spitting of blood six months after, and as he died of consumption within three years after, the probability is a strong one, that his lungs were diseased at the time that he effected the insurance, whatever his own impression or belief in the matter may have been.

From his own account of the attacks he had had, he could not answer truthfully that he had never had the disease of spitting of blood or any disease of the lungs, and good faith required, when the inquiry was propounded to him, either an answer in the affirmative or a statement of what had occurred. In *Beach v. Ingalls*, 14 Mees. & Wels. 95, where a similar inquiry was propounded to the insured, and answered by him in the negative, Chief Baron Pollock said, "one single act of spitting of blood would be sufficient to put the insurers on inquiry as to the cause of it, and ought, therefore, to be stated." In this case, it appeared that the insured, four years before he obtained the policy, had spit blood and subsequently exhibited other symptoms usual in consumptive subjects, and died of consumption three years after the execution of the policy. The judge at the trial told the jury, that it was for them to say, whether he had, at the time of making his statement, such a spitting of blood, &c., as would have a tendency to shorten life, and a new trial was granted upon the ground that the insured, upon such an inquiry, was bound to make known the fact that he had spit blood. "If a man had spit blood from his lungs," said Rolfe B., "no matter in how small a quantity, or even had spit blood from an ulcerated sore throat, he would be bound to state it," which is going much farther than the facts in the present case call for.

Nor does it at all affect this case that Major Foot, in an application previously made for an insurance upon his life to another company, made known to the agent of that company,

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who was the medical examiner in the present application, that he had had two attacks of spitting of blood. The medical examiner in the present case, Dr. Buehler, was not authorized by the defendants to effect insurances for them ; nor did he assume to do so. The defendants had an agent of their own at Harrisburgh, where Major Foot then was. Dr. Buehler was the agent then for another company in which Major Foot had obtained an insurance upon his life, and as he wished to have an insurance in different companies, Dr. Buehler simply recommended the defendants' company. He made out Major Foot's application to the defendants, and signed the certificate of a medical examination by him, but he made the application for him to the defendants through their agent at Harrisburgh, to whom he submitted the application, and from whom he received the policy for Major Foot. Dr. Buehler testified distinctly that he did not act as the agent either of the defendants or of Major Foot. That he made the application for him at his request, to oblige him. That he was not agent for the defendants at any time, nor for any purpose. That he was paid by the defendants his fee for the medical examination, and would have been, whether the application was successful or not. That he knew, at the time of the examination for the present application, of the two attacks of spitting of blood, but he says, "I overlooked it." As he was not an agent authorized to effect the insurance, what he may have overlooked, whether intentionally or through forgetfulness, can in no way affect the defendants. They were not bound by what he might say or omit to say. The application for the insurance was in a prescribed form. Twenty-five questions had to be answered by the applicant for the insurance, in writing, distinct from and independent of fifteen questions which had to be answered by the medical examiner, and it was not for Dr. Buehler, but for the defendants or their agent in Harrisburgh, to say, when the application with the answers were laid before them, whether the risk would be taken or not. Dr. Buehler testified that he read the questions distinctly to Major Foot, and wrote down the answers as he gave them to him. That he seemed to understand each question, and answered appropriately. That he (Buehler) read the declaration,

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before referred to, distinctly to him, and that he signed the application. The policy was issued upon the basis of the written statement and the answers given by Major Foot to the inquiries propounded to him; and this being the case, the policy would be defeated, the answer being untrue in respect to the spitting of the blood and disease of the lungs, even if Dr. Buehler had been an agent of the defendants for procuring an insurance, and knew that Major Foot had had spitting of the blood, unless the doctor, in addition to being an agent to procure application, was also authorized by the defendants to agree with Major Foot for a policy (*Vose v. The Eagle Life Ins. Co.* 6 Cush. R. 42).

The answers were warranties; and the answers referred to being untrue, there was a breach of the warranty upon which the insurance was made, and which rendered the policy void (*Jennings v. Chenango Mutual Ins. Co.* 2 Den. 75; *Chaffee v. The Catteraugus Co. Mutual Ins. Co.* 18 N. Y. 376; *Brown v. Same*, Id. 385; *Chase v. Hamilton Ins. Co.* 20 N. Y. 52; *Le Roy v. The Market Fire Ins. Co.* 39 Id. 90; 1 Phillips on Insurance, c. 7, § 16).

Judgment reversed.

Upon a reargument, the following opinion was delivered.

BY THE COURT.*—ROBINSON, J.—Upon reargument allowed, some additional considerations have been presented, with earnestness, by the eminent counsel for the plaintiff, whereby he has endeavored, upon the facts presented in the case, to rescue the memory of a beloved son from reflections upon his conduct contained in the statement of facts, or the conclusions therefrom, in the opinion of the Chief Justice (in which all the members then composing the court, including myself, concurred), as warranted by the testimony; and also to show error of the court in entertaining on appeal matters which ought to be solely regarded on a case previously submitted and decided on the judge's minutes, or at special term, as distinguished from mere *exceptions* arising on matters of law heard on a direct appeal.

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

The recitals of facts contained in that opinion, showing the particulars of the attack of spitting of blood, from hemorrhage of the lungs, which the assured had suffered in the fall of 1865 and spring of 1866, was derived from his own testimony (taken provisionally, for perpetuation under the statute); and the assumed injustice in the previous opinion is alleged to consist in allusion to his statement in his answers made in January, 1867, upon the faith of which the insurance on his life was made, in which it is stated that "he could not answer truthfully that he never had the disease of spitting of blood, or any disease of the lungs; and good faith required, when the inquiry was propounded, either an answer in the affirmative, or a statement of what had occurred."

A perusal of the case can lead to no other conclusion. In answer to the question (No. 11), "if he had ever had (among others enumerated) the disease of spitting of blood, consumption or disease of the lungs?" he answered, "No;" and to the 13th question, if, during the last seven years, he had "any severe disease?" he also answered, "No." And these patent and uncontradicted facts, recited as from his own testimony, present the merits of this controversy, upon the truth or falsity of these answers.

On his examination, as a witness, in answer to the inquiry, "Did you ever spit blood prior to the time of the issuing of the policy on your life by the Ætna Insurance Company?" Answer: "Yes, when I had the hemorrhages." Question: "How many times did you spit blood?" Answer: "I cannot answer that question, not knowing the difference between hemorrhages and spitting of blood; but if the former, *twice*;" and during the first attack of hemorrhage, he says he spit blood over ten times; also, in conversation with Dr. Buehler, the certifying physician in reference to such application, he says he told the doctor about his hemorrhages, and said, "he did not think he could get his life insured." The benefit of any doubts as to his ingenuousness and good faith founded on *his belief* that he had recovered from his hemorrhages, and that they would not occur again, has been^e fully accorded in the verdict of the jury on the question submitted to them, as to whether he had *knowingly* had any of the diseases specified in the 11th question, which they have answered in the negative.

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Assuming, as is claimed, that the matters in review on this appeal were merely such as were cognizable under a strict bill of exceptions, and that the verdict of the jury could not be disturbed but for error in law, there are such errors in the ruling, of the judge, to which exceptions were taken, as call for a reversal of the judgment.

First, the contract of insurance expressly adopted the proposals, answers, and declarations, which were declared to be part and parcel of the policy, as fully as if therein recited, and that upon the faith thereof the agreement was made, *and that if they should be found in any respect false or fraudulent, then the policy was to be void.*

The learned counsel for the plaintiff contends, that notwithstanding this adoption of the proposal, &c., as the basis of the contract, yet this latter provision (*italicised*) controlled as to any causes rendering the agreement void, and that no defense existed in the fact that any representation was merely untrue, unless it was also "false or fraudulent," and that under the charge of the judge, the jury having found in plaintiff's favor, the verdict ought not to be disturbed upon any considerations that might otherwise be urged upon a case made and motion thereon for a new trial for general error.

In view of the testimony of the assured, as above referred to, there can be little doubt but that the jury have rendered their verdict out of consideration for the public character and virtues of the assured, and his loss of life from wounds or injuries sustained in the service of his country, rather than upon the question of the entire truthfulness of his representations. There was, undoubtedly, much to extenuate his statements, from his conviction he had that he would recover, and that his hemorrhages would not again occur; but none for his failure to disclose the previous hemorrhages from his lungs.

The express adoption of the proposal, answers, and declarations as part and parcel of the contract and the basis upon which it was made, constituted them in law *express warranties* in respect to the matters therein represented (*Kelsey v. Universal Life Ins. Co.* 35 Conn. 225; *Miles v. Conn. Mut. Life Ins. Co.* 3 Gray, 580; *Burritt v. Saratoga Mut. Life Ins.*

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Co. 5 Hill, 188; *Murdoch v. Chenango Co. Mut. Life Ins. Co.* 2 N. Y. 210; *Mut. Life Ins. Co. v. Wager*, 27 Barb. 865; *Campbell v. N. E. Life Ins. Co.* 98 Mass. 381), and "a misstatement in a *warranty* is therefore fatal to the contract, although arising *from the most innocent mistake*, or from *false information*, or from *mere inadvertence*, and as much so as if made with the most wilfully fraudulent intent" (*Bliss on Life Ins.* § 37, and cases cited in notes).

The judge refused to charge as requested, that if the answers were untrue, the warranty was broken, and that invalidated the policy; but only charged that they were warranties, *to some extent*, and if any answer was untrue, and *was known* to be untrue at the time it was made, the warranty was broken, and that vitiated the policy. The refusal to charge as requested was error, as also was his limitation of the effect of the untrue representation to its having been *knowingly* made. The force of a warranty rests upon *its substantial truth*, and not upon the warrantor's knowledge or belief in its verity (see authorities above cited). But it is further claimed, on the part of the plaintiff, that by the true construction of this agreement, the force or effect of the proposal, answers, and declarations as warranties, was waived or merged in the subsequent provision constituting as sole cause for avoidance of the contract "*if found in any respect*" *false or fraudulent*.

I do not think such construction can be given to this instrument. As already observed, this stipulation as to the proposal, declaration and answers constituted an *express warranty*, and the additional provision as to their being "false or fraudulent," was inserted out of abundance of caution, to cover any other possible case of false suggestion, suppression of the truth, or other fraudulent purpose. Had there been any inconsistency in this respect, the well-known rule of construction applies, that in agreements "*inter partes*" the earlier clauses should prevail (2 Pars. on Cont. 26).

- But were this otherwise, the judge erred in holding, even in respect to a representation, that either to constitute a breach of warranty or to be "false," the defendant was bound to show that the statement was "*knowingly*" or "*intentionally made*."

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As warranties, being *untrue*, they were clearly broken, but to be "false or fraudulent," other elements were required. To be "false" it was necessary to show further, that they were material in inducing the defendants to enter into the contract. In the present case the materiality of the answer to the 11th and 13th questions cannot be doubted. The contract itself discloses an intentional variance in the use of the terms "false or fraudulent," and no such distinction can be attributed to them unless regard be had to the ordinary acceptation of the word "false" as referring to a matter untrue, in some *essential* particular, without regard to the knowledge or motive of the person making the representation, who is chargeable with a "*fraudulent*" design, only when he acts *intentionally*. This distinction between a *false* and *fraudulent* representation is well taken in numerous cases.

In *Alston v. Mech.'s Mut. Ins. Co.* (4 Hill, 334), Chancellor Walworth says: "And if the representation be *false* in any material point, even through mistake, it will avoid the policy." In *Carpenter v. Am. Ins. Co.* (1 Story, 62), Judge Story says: "A *false* representation of a material fact is, according to well-settled principles, sufficient to avoid a policy of insurance underwritten on faith thereof, whether the *false* representation be by mistake or design." In *The Mut. Life Ins. Co. v. Wager* (27 Barb. 365), the court, Sutherland, J., says: "A false representation will avoid a policy if the actual risk was greater than it would have been, had the representation been true. In such action it would not have been necessary for the insurers to show that the misrepresentation or concealment was *intentional* or fraudulent."

Kerr on Fraud and Mistake (Am. ed. 57) says: "If a man make a representation in the honest belief that it is true, and there is reasonable ground for such belief, a fraudulent intent will not be imputed to him, although it may turn out to be *false*, unless there be a duty cast on him to know the truth."

In *Bennett v. Judson* (21 N. Y. 238) the Court of Appeals have held more broadly, "that one, who, without the knowledge of its truth or falsity, makes a material misrepresentation is guilty of fraud as much as if he knew it to be untrue."

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And see 1 Story Eq. Ju. § 193; *Wall v. Howard Ins. Co.* (14 Barb. 383). And so if one swear to a fact, without *actual* knowledge, "then it is legal *false swearing*" (*Carroll v. Charter Oak Ins. Co.* 10 Abb. Pr. N. S. 175); although what he swears to may prove in fact to be true (Russ. on Crimes, 1753; *Commonwealth v. Cornish*, 6 Binn. 249).

While in respect to a *warranty* no recovery can be had, unless the representation is substantially true, because such is the exaction of the contract, yet, to defeat a recovery upon a contract by reason of a "*false*" representation, it must be shown not only untrue but material to the risk, although it be immaterial whether it was innocently made or not, and to maintain it as "*fraudulent*," it must not only be untrue and material, but must have been made with *intent* to deceive or defraud, and actually relied on.

The judge erred in not giving due weight to these considerations, which went to the very merits of the action.

The proposal, answers and declarations being regarded as strict warranties, there was error in overruling the several objections for irrelevancy taken in various instances, against the admission of testimony tending merely to relieve the assured from the imputation of bad faith, and also in the admission of testimony in various other respects, which it is unnecessary to particularize at length, as the foregoing propositions are radical, and preclude the plaintiff, upon the testimony of the assured, from any recovery. .

In my opinion the judgment should be reversed, and judgment absolute should be rendered in favor of the defendants.

Judgment reversed.

Brennan v. The Security Life Insurance and Annuity Co.

THOMAS BRENNAN v. THE SECURITY LIFE INSURANCE & ANNUITY Co.

Where the facts stated in a complaint upon a money demand on contract are admitted, and nothing is required to be done to entitle the plaintiff to a complete judgment in his favor, but a mere computation of interest on the demand for the period claimed, the defendant, upon an affirmative defense set up in his answer, has the right to open and close.

Interest is a mere incident to the principal sum claimed, and the amount is not the subject of controversy. In law it is entirely certain, in accordance with the rule that that is certain which can be rendered certain.

In a policy of life insurance in which it is provided that if the declarations of the insured, and "upon the faith of which the policy is made, shall be found to be, in any respect, untrue," that then the policy shall be void, the entire truthfulness of such declarations is thereby made matter of warranty or condition precedent to a recovery upon the policy, and to avoid the policy it is not necessary that the declarations should be fraudulent as well as false, nor that they should be on a matter material to the contract, nor that the insurers should have issued the policy on the faith of the declarations.

APPEAL by defendants from a judgment entered on the verdict of a jury.

Action on an insurance policy issued on the life of George Schott, and which policy had been assigned to plaintiff.

The facts are stated in the opinion.

R. H. Underhill, for appellants.

John McKeon, for respondent.

BY THE COURT.*—ROBINSON, J.—The first point presented for consideration is one of practice at the trial, whether where the case stated in the complaint upon a money demand on contract is admitted, and nothing is left for a complete judgment in the plaintiff's favor, but a mere computation of interest on the demand for the period claimed, the defendants, upon an affirmative defense, set up in their answer, had the right of

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opening the case to the jury. The judge at the trial, under such circumstances, granted this right to the plaintiff, against the objection and exception of the defendants. In this there was error. The right to open and close the case to the jury is a substantial one. The affirmative of the issue rested with the defendants; except as to a mere computation of interest, it was incumbent on them to establish all material facts presented for trial, and the mere calculation of the amount of the plaintiff's claim, so far as it included accrued or accruing interest, was not the subject of controversy. Interest is a mere incident to the principal claim, and in law is entirely certain. "*Id certum est, quod certum reddi potest.*" No fact is to be proved in respect to it, and its computation is a mere clerical act, that may be performed on the trial by the judge, or referred to the clerk or jury. Any error in the calculation is the subject of correction at any stage of the proceeding, without *special* exception being taken. Such absolute right of the defendants to open and close the case, where the affirmative of the issue presented by the pleadings rested with him, has been fully recognized and sustained by the courts (*Geach v. Ingall*, 14 Mee. & Wels. 95; *Ashby v. Bates*, 15 Id. 589; *Huntington v. Conkey*, 33 Barb. 218; *Ellwell v. Chamberlain*, 31 N. Y. 611; *Hoxie v. Green*, 37 How. Pr. 97; *Lindsley v. European Pet. Co.* 3 Lans. 176).

The judge also erred in refusing to direct the jury to find a verdict for the defendants if they believed the insured withheld from the defendants the fact that he held two (undisclosed) policies in the Guardian and Equitable companies (shown to have been for \$30,000, in addition to the \$35,000 disclosed), but referred to his previous charge, in which he had stated that, as to the answer of the insured to the 25th question in the application ("What amounts are now assured on the life of the party, and in what company? the answer being, 'Ætna, \$10,000; Knickerbocker, \$15,000; \$10,000 additional applied for in Ætna'), if they found that George Schott (the assured), when he made that answer or declaration, was guilty of a *false and fraudulent representation*, and that *such representation was material* in the judgment of the insurers, and induced them to take the risk, then you will find for the defendants."

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In this there was a disregard of the contract of insurance sued on, in which it was expressly stated, that "if the declaration made by the insured (containing the above question and answer), and forming part of this contract, *and upon the faith of which* this policy is made, shall be found, in any respect, untrue, then and in such case the policy shall be null and void," and without considering that the *entire truthfulness* of such declaration was, by the contract, made matter of *warranty* or *condition precedent* to any recovery upon it (*Chaffee v. Cattaraugus Nat. Ins. Co.* 18 N. Y. 378, and cases cited; Bliss on Life Ins. § 36, and cases in notes; and see *Foot v. Aetna Life Ins. Co.*, decided on reargument this term).

The responsibility of the defendant was placed by the judge upon other grounds, and made to depend on the representation being "false and fraudulent," and "material in the judgment of the insurers, in inducing them to take the risk." This left to the jury "full scope and verge" for consideration of the mere mental operations and speculations, both of the insurer and insured, in respect to the matter of inquiry; while by the contract the *entire truthfulness* of the answers, in respect thereto, was made a primary test or condition of the defendant's liability.

For these reasons the judgment should be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed.

Blackstone v. The Allemania Fire Insurance Company.

WYLLIS BLACKSTONE, RECEIVER OF THE NORTH AMERICAN FIRE
INSURANCE CO., v. THE ALLEMANIA FIRE INSURANCE CO.

In a contract of reinsurance in which it was provided that the loss, if any, should be payable *pro rata* and at the same time with the reinsured, *Held*, that the liability of the company reinsuring, accrued at the same time with the liability of the reinsured, and that in order to sustain an action it was not necessary that the company reinsured should have actually paid the loss, but it was sufficient if they were liable to pay.

Plaintiff, receiver of an insolvent insurance company which had reinsured its risk, after having suffered a loss, paid a dividend of 44 per cent. which exhausted the assets of the company; *Held*, that in a suit on the policy of reinsurance, under which the loss was payable *pro rata* and at the same time with the reinsured, the plaintiff was not restricted in his recovery to the amount actually paid to the insured, but could recover the whole amount of the loss.

THIS was a controversy submitted without action upon a case made. The plaintiff, as receiver of the North American Fire Ins. Co., claimed to recover of the defendants \$2,203 81, with interest from February 13th, 1872, upon the following facts: On August 5th, 1871, the North American Fire Ins. Co. issued a policy (No. 4,985) to D. W. & A. Keith & Co. of Chicago, Illinois, insuring them against loss or damage by fire, for the space of three months, to the amount of \$5,000, on their stock of goods, &c., other insurance being permitted.

On or about October 9th, 1871, the property covered by said policy, was destroyed or damaged by fire. Proofs of such loss were duly served upon the plaintiff, as receiver of said company, on the 18th day of November, 1871, and the loss became payable 60 days thereafter. The claim was admitted as a just claim against the assets of the company, and the amount due to said D. W. & A. Keith & Co. under said policy was adjusted at \$4,407 62. The North American Fire Ins. Co., having become insolvent, the plaintiff was by an order of the Supreme Court, made October 20th, 1871, appointed receiver under the statute relating to proceedings against corporations in equity, and on the same day filed his bond and entered upon the discharge of his duties. On November 24th, 1871, a decree was entered dissolving said company and continuing and confirming

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the plaintiff in his office as receiver. On or about February 21st, 1872, the receiver declared a dividend of 40 cents on the dollar upon all claims against the said company admitted by him. The said D. W. & A. Keith & Co. were on March 1st, 1872, paid 40 per cent. upon their claim. A second and final dividend of 4 cents on the dollar was declared by said receiver, payable on February 19th, 1873, and said amount of 44 per cent. upon \$4,407 62, to wit, \$1,939 35, is the entire sum that has been or will be paid to said D. W. & A. Keith & Co., under their policy. .

On August 5th, 1871, the defendants reinsured the North American Fire Ins. Co. against loss or damage by fire to the amount of \$2,500 for the space of three months, from August 5th, 1871, "on their insured interest under their policy, No. 4,985, issued to D. W. & A. Keith & Co. * * * * loss, if any, payable *pro rata* and at the same time with the insured." The policy also contained the following provision: "And the said company do hereby promise and agree to make good to the said assured, their executors, administrators and assigns, all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, * * * * to be paid within sixty days after notice and due proof thereof made by the assured in conformity to the conditions annexed to this policy." The insured interest of the North American Fire Ins. Co. was further reinsured to the amount of \$2,500, in the Andes Ins. Co.

On December 14th, 1871, certain papers, intended to operate as proofs of the loss before mentioned, were served by the plaintiff upon the defendants, who received and retained them without objection. The plaintiff claimed to recover \$2,203 81, with interest thereon from February 13th, 1872, that being 60 days after service of said papers.

The defendants claimed that they were only liable to pay one-half of the amount actually paid or that should be paid to D. W. & A. Keith & Co. by the plaintiff, and offered to allow judgment against them for that sum.

The question submitted to the court upon the case made was as follows: Is the plaintiff entitled to recover \$2,203 81,

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with interest from February 13th, 1872, or is he only entitled to recover the amounts actually paid to the original insured by the North American Fire Ins. Co. or their representative, the plaintiff, with interest on the said amounts from the time the same were respectively paid?

Beardslee & Cole, for plaintiff.



I. The contract of reinsurance is entirely distinct from the contract of insurance. It is a contract of indemnity *to the party obtaining it*, and such indemnity is the whole amount of the loss *incurred* by the original insurer (Emerigon Tom. 1, p. 247-250; 1 Boulay, Paty Tr. des Assurances, ch. 8, edition of 1827; 1 Alauzet Tr. gen. des Assurances, No. 152, p. 276; 2 Park on Ins. 595-596; 1 Marshall on Ins. 143; 2 Phillips on Ins. 749; 1 Arnould on Ins. 288; 3 Kent's Comm. 5th ed. p. 279; Flanders on Ins. p. 32).

II. The contract of reinsurance is one between the two companies only. The original assured has no claim of any kind against the reinsurer. The reinsured remains solely liable on the original insurance, and alone has any claim against the reinsurer (*Carrington v. Com. F. & M. Ins. Co.* 1 Bosw. 152; *Herckenrath v. Am. Mut. Ins. Co.* 3 Barb. Ch. 63, and authorities cited, *supra*).

III. The amount *paid* by the original insurer has nothing to do with the claim against the reinsurer. The reinsurer must pay to his assured the whole amount for which the original insurer becomes *liable*. Inability on the part of the original insurer to pay does not in any way affect the liability of the reinsurer (*Eagle Ins. Co. v. Lafayette Ins. Co.* 9 Ind. 443; *Hone v. Mut. Safety Ins. Co.* 1 Sand. 137; affirmed in 2 N. Y. 235).

IV. The provision in the policy which is relied upon to change the nature of the contract is "loss, if any, payable *pro rata*, and at same time with the reinsured." The words, *pro rata*, when operative, transform the contract of reinsurance into one of co-insurance with the original insurer. The proportion is between the amount of reinsurance and the original sum insured (Griswold, Fire Underwriters' Text Book, § 1055).

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The *pro rata* clause is entirely unoperative when there is a full reinsurance, and the reinsurer must then pay the whole loss (*Ib.*).

Where a full reinsurance is made, but in different companies, the *pro rata* clause is also inoperative. The contribution clauses in the reinsuring policies determine the respective amounts which the reinsuring companies must pay.

V. The latter part of the clause "payable at the same time with reinsured" cannot be held to make payment by the original insurer a prerequisite to a demand upon the reinsurer; it only refers to the commencement of the original insurer's *liability* to pay (Flanders on Ins. p. 35, note).

Aldace F. Walker, for defendants.

I. The general term of the Superior Court of the city of New York discussed this question in *Hone v. Mutual Safety Ins. Co.* 1 Sandf. 137, and allowed a recovery in full, under the policy sued upon in that case, although the reinsured company became insolvent so that its assets were not sufficient to pay more than fifty per cent. of its indebtedness. This case was affirmed by the Court of Appeals, the defendant being there represented by other counsel, who do not seem to have raised the point now in question, as it is not alluded to in the statement of facts, or discussed in the opinion of the court (2 N. Y. 235). As a precedent, therefore, it gives to the present plaintiff the support only of the general term of a co-ordinate court; and only so far as the facts of the Hone case correspond with those now before this court.

II. The policy issued by the defendant contains these words: "*Loss, if any, payable pro rata, and at same time with the reinsured.*" 1. "*Loss, if any, payable pro rata,*" that is, we agree that only such proportion of the total loss shall be payable by the reinsurer, as the sum named in the policy of reinsurance bears to the sum named in original policy.

2. "*Loss, if any, payable * * at same time with the reinsured;*" that is, we agree that the loss shall be payable only when it is paid by the reinsured, *and not before.*

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BY THE COURT.*—ROBINSON, J.—The contract of reinsurance in question is, in all its main features, similar in its obligations to that passed upon in the case of *Hone v. Mutual Safety Insurance Co.* (1 Sandf. Ch. 137; affirmed, 2 Coms. 235), except that it provides that “the loss, if any, shall be payable *pro rata* and *at the same time* with the reinsured.”

The loss against which the North American had insured, to the extent of \$5,000, occurred in October, 1871, and amounted to \$4,407 62, which became payable in 60 days after service of proof of loss, made on the 18th of November, 1871. This reinsurance, to the amount of \$2,500, was effected in August, 1871, and subsisted at the time of the loss, but the North American subsequently became insolvent, and was dissolved by a decree of the Supreme Court, the plaintiff's receivership and right to collect its assets being continued.

Upon such loss of \$4,407 62, the plaintiff has paid a dividend of 40 per cent. and declared a further dividend of 4 per cent., which is all that can be realized or paid out of the assets of the company. No objection was ever made to the proof of loss served on the defendants, and the only substantial question presented is upon the construction of the terms in the policy of reinsurance above quoted. It is not questioned but that the defendants were liable for one-half of so much of the loss as has been paid; but they contend they are not responsible for any portion thereof which has not been paid or which that company or its receiver are wholly unable to pay. The policy of reinsurance had express reference to the original policy of the North American (No. 4,985) and to its obligations, and the question presented is, whether the defendants are bound to pay this proportion (one-half) of the loss sustained by the North American, which they became liable to pay in 60 days after service of proof of loss, or only of such sum as the latter company have actually paid. Was the time so fixed for payment by the defendants to be contemporaneous with that presented in the obligation of the reinsured, or when actual payment had been made by them to the party they had insured; or, in other words, did it refer to *the time* when the original insurance called for payment, or to *the*

* Present, DALY, CH. J., ROBINSON and LOWE, JJ.

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circumstance of actual payment of the loss? In the former case, the contract was but one of indemnity; in the latter, it was necessarily one to provide the reinsured with means to protect themselves against their liability to the parties they had insured.

No privity of contract existed between the parties originally insured and the reinsurers, even in case of the insolvency of the original insurers (*Herckenrath v. Am. Mut. Fire Ins. Co.* 3 Barb. Ch. 63). Under the ordinary construction of contracts of reinsurance, they impose upon the reinsured no obligation to pay the insured or to prove actual payment of the loss before he can call upon his reinsurer (3 Kent Com. 279, and cases cited in note *c*; *Hone v. Mut. Safety Ins. Co. supra*; 1 Pars. on Mar. Ins. 300). "When the loss has happened and been duly ascertained, the reinsurer must pay to the first insurer the amount of the loss within the policy, notwithstanding the first insurer has become insolvent, and can only pay in part. He must pay the entire sum reinsured, and has no concern with any arrangement between the first insured and his creditors" (2 Kent Com. 279, note *c*). This contract of reinsurance having been made with express reference to the original policy of insurance, prescribing the time for payment of the loss thereby insured against, must be construed as merely fixing a like time for payment of the *pro rata* loss to the reinsured. Such is its natural construction as a mere contract of reinsurance: the loss against which it insures is "payable" at the same *time* with the reinsured—not when the reinsured have actually made payment. Whatever ambiguity or uncertainty, if any, exists, is upon well recognized principles of construction, to be held the most strongly against the defendants as the contracting party. The terms used do not indicate with any plainness of intention, as against the rules of law above stated, that the payment to be made under it should be deferred until the reinsured had made actual payment of the whole loss. And, in my opinion, the clause in question has reference to the time which, by the original insurance, the North American were required to make payment of the loss, rather than to the circumstance that they had made such payment.

Judgment should be given accordingly on the case submitted. Judgment for plaintiff.

Constant v. The Rector, Wardens and Vestry of St. Albans Church.

ELIZA S. CONSTANT v. THE RECTOR, WARDENS AND VESTRY
OF ST. ALBANS CHURCH.

The trustees of a religious corporation can alone bind the corporate body, and to execute this power, they must meet as a board, so that they may hear each other's views, deliberate and decide. The separate action of the trustees individually, without meeting and consulting together as a board, even though a majority in number should agree upon a certain act, is not binding upon the corporation, and cannot, of itself, create a corporate liability.

Plaintiff, at the request of certain of the trustees of an Episcopal church, carried on a fair for the benefit of the church, with the understanding that the expenses of the fair were to be paid for from the proceeds of the fair. Plaintiff paid the expenses of the fair, and the gross receipts were turned over to the building committee of the church, by whom they were used in the purchase of land and the erection of a church edifice. Plaintiff brought an action against the church for the money expended by her in the purchase of articles, &c., for the fair. *Held*, that the individual acts of the trustees could not bind the church, and that plaintiff could not recover.

Quære, as to whether a religious corporation can engage in a fair for the purpose of raising money to build a church.

It appeared that plaintiff had told one of the building committee, who was also one of the trustees, of her claim to be paid, from the proceeds of the fair, for the expense incurred by her, but that he had not informed the board of trustees of the claim. *Held*, that this was not notice to the trustees of her claim, and that the church took the fund relieved of any charge upon it to pay the plaintiff's claim.

APPEAL by defendants from a judgment entered on the verdict of a jury.

The complaint alleged that during the winter and spring of 1865, the defendants determined to hold a fair for the purpose of raising funds for the benefit of St. Albans Church, and to that end, they came to the plaintiff and requested her to take active management and superintendence of the preparations for and conduct of the fair. That she agreed to do so in April, 1865, and that the fair was held accordingly, at which she was manager and superintendent, and as such paid various bills necessarily incurred about the fair, on the understanding that the amounts so disbursed were to be repaid to her by the defendants from the receipts of the fair, or otherwise, and not intending them as gifts to the defendants. That she so paid \$3,722 $\frac{22}{100}$.

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That at the close of the fair, the defendants appropriated the entire receipts of the fair, and did not and had not repaid the plaintiff. On the trial, it appeared that some time previous to the fair, the plaintiff had been requested to take charge of a fair to be held for the purpose of raising money to erect a church, by Messrs. Alburtis, Constant, Gorham, and Allen, the two former of whom were churchwardens, and the latter two, vestrymen of the defendant. In February, 1865, the plaintiff met, at the house of Mr. Alburtis, the rector of the church, Mr. Morrill, and Messrs. Alburtis, Allen, Constant, and Mr. Gorham (a vestryman), to talk over the subject of the fair, and at this meeting it was understood between them that the expense of the fair was to be paid from the proceeds.

The facts in regard to the way in which the fair was held, and what was done with the proceeds, are stated in the opinion. The plaintiff had a verdict.

S. P. Nash, for appellants.

Henry Nicoll, for respondent.

BY THE COURT.*—DALY, CH. J.—A new trial must be granted in this case for the refusal of the judge to instruct the jury as requested, that the acts of the members of the vestry at the time the plaintiff consented to take charge of the fair were not obligatory on the defendants. The refusal so to charge was equivalent to holding that they were, and the jury upon that presumption may have found a verdict for the plaintiff, upon the ground that she undertook to get up and manage the fair at the request of certain members of the vestry, with the understanding on her part and upon theirs, that the expenses incurred were to be paid out of the proceeds, and that as the *gross* receipts and not the *net* earnings of the enterprise were received by the defendants, they were received subject to the plaintiff's right to have the money she had expended returned to her by

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

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the defendants. It is sufficient that the jury may have given their verdict upon this ground, to show that the instruction requested was material, and as it was erroneous to refuse it, there will have to be a new trial.

The defendants are a religious corporation, the temporalities of which are, by statute, managed by a board of trustees, consisting of the rector, two churchwardens, and eight vestrymen (1 R. S. 212, 3 Edward's Stat. 687, § 1). The trustees of a religious corporation can alone bind the corporate body, and to execute this power they must meet as a board, so that they may hear each other's views, deliberate and decide. The separate action of the trustees individually, without meeting and consulting together as a board, even though a majority in number should agree upon a certain act, is not binding upon the corporation, and does not and cannot of itself create a corporate liability (*Cammeyer v. United German Lutheran Churches*, 2 Sandf. 229, 230; Tyler's American Ecclesiastical Law, p. 99; Angell & Ames on Corporations, § 504, p. 496, 8th ed.).

It is provided by statute that no meeting of the board of trustees can be held unless at least three days' notice of it is given in writing by the rector or one of the churchwardens (3 Edm. S. S. 687). The conference which the plaintiff had at the house of one of the churchwardens respecting the getting up of this fair, at which the rector of the church, the two churchwardens, and two of the vestry were present, was not a meeting of the board of trustees. Mr. Gorham, the treasurer of the board, testified that "it was not a vestry meeting of any kind—not even a business meeting." Alburtis, the churchwarden at whose house it took place, says that it was not a vestry or a formal meeting in any sense. There is nothing in the evidence, on the part of plaintiff, to show that it was; in addition to which the rector testified that the subject of the fair was "never brought before the vestry in any official shape." What was said therefore on that occasion, at Mr. Alburtis's house to the plaintiff by the persons who were present, was in no way binding upon the corporation, and could not create or impose any obligation upon it, unless those who were there acting and speaking individually were by some act of the corporate body

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clothed with authority as agents or officers to contract on its behalf, and of this there was no evidence.

A religious corporation, like any other, is bound by the acts of its authorized agents in matters that are within its corporate capacity, and may, by the enactment of by-laws, or the distribution of the exercise of its powers among its various officers, or by conferring authority upon special agents, so charge itself as to become amenable for the acts of individuals representing it, and acting by its authority. It will, in certain cases, be presumed to have conferred authority where the act is done with its official knowledge, or is afterwards ratified by the corporation availing itself, with knowledge of all material facts, of what was done on its behalf, or otherwise directly approving and confirming it. This is familiar law in respect to which it is not necessary to cite authorities, but nothing of this nature is shown by the evidence in this case.

Assuming that the getting up and management of a fair for the purpose of raising money for the erection of a church building was not *ultra vires*, but within the capacity of a religious corporation—a point which it is not necessary to decide—there is nothing to show that the corporation ever authorized such an enterprise; nor that the board of trustees, by any action on their part, as a body, conferred upon any one or more of their number, or upon any one else, authority to engage in such an undertaking on behalf of the church, or that there was any ratification of what had been done, otherwise than by receiving from one of their number, with whom the proceeds of the fair had been deposited, the benefit of a sum of money obtained by the holding of it, a part of which went towards the erection of the church building and the residue, towards the purchase of the land upon which the edifice was built.

If the board of trustees had been officially advised, by notice or otherwise, before this money was laid out and expended in the erection of the church and the purchase of the land, that there was an understanding between the plaintiff and those who induced her to get up and superintend the fair, that any expense incurred by, or money laid out by her in furtherance of its object, was to be deducted from the proceeds,

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and that the sum of money handed over as the proceeds of the fair, was subject to a deduction of this kind, they would have taken it *cum onere*, and the corporation would be bound to restore to the plaintiff the \$3,400 which she expended in getting up and managing the fair. The acceptance of the money, with a knowledge of the manner in which it was obtained, and of the deduction to which it was subject, might, within the cases, be viewed either as an approval and ratification, on the part of the corporation, of the understanding entered into by certain members of the vestry with the plaintiff, before she engaged in the enterprize, or as money had and received by the corporation for the plaintiff's use (*Smith v. Tracy*, 36 N. Y. 83; *Murray v. Bininger*, 3 Keyes, 109; *Keeler v. Salisbury*, 33 N. Y. 653; *Christian University v. Jordan*, 29 Miss. 68; *Jack v. Burnett*, 12 Cl. & F. 812; Angell & Ames on Corporations, § 304; Grant on Corporations, pp. 559, 560).

In this case the receipts of the fair were every evening handed over by a lady who acted as treasurer, to one of the churchwardens, Mr. Constant, who was the plaintiff's son, and was by him deposited with a banking firm of which he was a member, and placed to the credit of Mrs. Alburdis, the treasurer of the fair. When the fair was closed, this lady drew checks upon him for such bills as came in, and after paying these checks, the balance was handed over to him as treasurer of the building committee. It was credited to him on the books of his firm as treasurer of the fund of the building committee, for, as would seem from the testimony of the treasurer of the corporation, all the money raised for the building fund went to the treasurer of this building committee.

The proceeds of the fair never came into the hands of the treasurer of the corporation, who testified that he never received any of it, but it was paid by the chairman of the building committee, Constant, partly in the purchase of the real estate, on which the church was built, the title to which was at first vested in him, and the residue was expended by him in payments on account of the construction of the church edifice.

The fair was held about the middle of April, 1865, for some four or five days, and before the month of July in that

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year, the plaintiff sent the bills for the articles which she had bought for the fair, except a few for a small amount which she paid herself, to the banking house of which her son was a member, Alburtis & Constant, with her card, and the words written on it, "Pay for St. Albans Fair," which bills they paid and charged to her, she having funds of her own in their hands.

It appears, from her son's testimony, that after the close of the fair, the plaintiff stated that she had certain bills that were not paid, and that he informed her that the building committee had received the money obtained from the proceeds of the fair. He testified that she made this claim in the summer of 1866, more than a year after the holding of the fair, and (as I understand his testimony), that he either told her, or that such was the fact, that the money "had been handed over, by having been paid out," that "it had been most likely paid out on contracts for the building and on the purchase money of the lots;" the building, as appeared by other testimony, having been finished and opened on the 19th of November preceding. He says that this claim was advanced by her several times afterwards, but was never sent to the vestry to his knowledge, and was never communicated by him to the vestry.

The plaintiff, on her part, testified that she wanted to get all the bills together before she went to Alburtis & Constant. That she went to the firm in July after she sent in the bills, for the purpose of settling her affairs, and that they told her that the bills had been charged against her, and that she had no money there. That they told her that between \$7,000 and \$8,000 had been taken in at the fair, and upon her remarking that it was a strange thing that she should not be paid, that Mr. Alburtis replied, her son being present, that they had commenced digging the foundation of a church, had paid for a lot, and had no money, and she protested against such treatment.

There is a very material conflict between her testimony and that of her son, but assuming, as we must do in support of the verdict, that the jury believed the plaintiff in preference to her son, it does not vary the case, or establish any liability on the part of the corporation. It relates simply to what took place

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between her and the firm of Alburtis & Constant. They, Alburtis & Constant, composed the building committee. They, or one of them, Constant, received the proceeds of the fair, and, either in consequence of the plaintiff delaying to send in the bills, for the expenditure she had made, until July, the fair having terminated about the 20th of April, or through her son's neglect or indifference to her interest, the whole of the proceeds which had come into his hands were applied by him in the purchase of the lots and towards the construction of the building, without any official knowledge on the part of the trustees that the plaintiff was entitled to have her expenses deducted from the sum which her son so applied. The allegation in the complaint is, that the plaintiff undertook the management of the fair at the request of the corporation, that she expended \$3,722 29 of her own money, with the understanding that it was to be repaid to her by the corporation out of the receipts of the fair, that at the close of the fair the corporation appropriated the entire amount of the receipts, and did not repay the plaintiff the amount she had so expended. The defendants deny that they requested the plaintiff to take the management of the fair. They deny on information and belief any understanding on their part that the bills paid by her were to be repaid to her by them out of the proceeds, and they aver that the moneys received by them as the proceeds of the fair were appropriated to the uses of the church, no claim having been made by the plaintiff, or any other person, to any deduction therefrom, and this latter averment is established by the evidence. They aver that the moneys so received were received as a free gift, a donation, and not otherwise, and it would be neither equitable or just to charge this religious corporation, with the repayment of this large sum to the plaintiff, after they have applied it to the uses of the church, upon the presumption that it was a gift, there being nothing in the case to show that they had any official knowledge that the plaintiff had any claim upon it, her son having testified that her claim was never communicated by him to the vestry, that it was never sent to the vestry to his knowledge, and the rector testifying that the fair was never brought before the vestry in any official shape. The trustees

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are entitled to the benefit of the assumption that if they had known that the plaintiff's claim was to be deducted from the moneys received as the proceeds of the fair by the chairman of the building committee, and would have to be repaid to her by the corporation if used for the building of the church, that they would, before allowing it to be so employed, have ascertained the amount to which the plaintiff was entitled, and used the residue only, as a gift or contribution made to the church. Having been used in the purchase of the land and in the building of the church, the corporation may now, for all that is known to the contrary, be wholly without means to pay it, and it would be unreasonable and unjust to charge them with a responsibility of which, as a corporation, they had no knowledge when this money was received and applied towards the erection of the church. Assuming even that the plaintiff's son, one of the trustees, knew that his mother was entitled to have the \$3,722 29 deducted from the moneys which came into his hands from the fair, and that with full knowledge of that understanding, he applied it as a member of the building committee to the erection of the church, that would not amount to knowledge on the part of the board of trustees, before which the subject of the fair had never been brought officially, and who cannot be held answerable, upon the principle of ratification, for what was known only by one or, at the farthest, two of their number (*Smith v. Tracy*, 36 N. Y. 83; *Rowan v. Hyatt*, 45 Id. 141; *President, &c. of Westfield Bank v. Cornen*, 37 Id. 323; *Murray v. Bininger*, 3 Keyes, 109; *National Bank v. Norton*, 1 Hill, pp. 578, 579).

It is a very hard case for the plaintiff that she did not have the amount which she paid out for the fair repaid to her from the gross receipts. It may, as I have said, have arisen from a want of vigilance on her part after the closing of the fair, or it may have been through an intentional and wrongful act towards her on the part of her son. If he, with a knowledge of her claim, turned over the whole amount to the church as a free gift or contribution to the fair, he is the person who should answer to her, and not this religious corporation who received it, and for whose benefit it was expended in the erection of a

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church, without any knowledge on their part, as a corporate body, of any claim upon it, or to any part of it by the plaintiffs, or by anybody else. The judgment should be reversed, and a new trial granted.

ROBINSON, J.—I concur in the result to which Chief Justice Daly has arrived, but from these brief considerations: that the plaintiff, while acting as “lady president,” or chief manager of the fair, referred to in the complaint, mainly organized and maintained through her efforts in its behalf, in no way raised even an *implied* legal obligation, to be repaid by the church, for any such moneys as she expended in her voluntary efforts in its behalf.

1st. The defendants possessed no power to carry on or conduct a *fair*, and could not delegate to any one authority for that purpose (1 R. S. 600, § 3).

2d. The “fair” and all proceedings connected therewith (so far as appears) were entirely *voluntary*, and intended as a mere *benefaction* in aid of the purposes of defendants’ incorporation; and although more moneys may have come to their possible use or benefit than was intended in the inconsiderate action of the plaintiff as donor, no recovery in law can be had by her for any excess she may have paid, beyond what, in her immediate benevolent purposes, she may have intended, or for sums which she improvidently disbursed or became liable for in the management of the fair.

3d. The receipts of the fair, so far as appears, were received and appropriated by the firm of Alburtis & Constant (of which plaintiff was a member) to the purchase of the four lots on which defendants’ church edifice was built, in the name of William J. Constant (plaintiff’s son), which he subsequently sold and conveyed to Joseph Sands, and the purchase money on such sale was paid to that firm.

The law raised no trust for defendants’ benefit in this transaction (1 R. S. 728, §§ 49, 51), nor imposed any obligation on them, by *implication*, for any acts done, or assumed to have been done, for their benefit, which were neither authorized or affirmed by their board of trustees.

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4th. The evidence also established a settlement by the defendants and discharge of the claim in suit with the legal successors in interest of plaintiff's firm.

For these reasons the recovery was unauthorized and untenable.

Judgment reversed.

ADAM P. BALDWIN v. THE NEW YORK & HARLEM NAVIGATION COMPANY.

Where damages which, though the natural consequences of an act, are not necessarily the result of it, are sought to be recovered, they must be specially alleged in the complaint. Such allegation of damage is not traversable matter, but must be inserted in the complaint, in order that the defendant may be prepared with evidence to rebut the proof offered of such damage, or the amount or extent of it.

If averments of such special damage are not originally inserted in the complaint, the judge may allow it to be done by amendment on the trial, when no injury will result to the defendant from it.

It will be assumed on appeal that the defendant was not injured by the allowance of the amendment, where the defendant at the trial merely made a general objection, but did not state any particulars in which he would be injured, such as showing the absence of witnesses who might have been procured, &c.

The practice recognized and acted upon in *Miller v. Garling* (12 How. Pr. 203), approved to the extent of the rule above stated.

In an action against a steamboat company for negligence, whereby defendant, while passing along the gang plank from the wharf to the deck of a steamboat, was thrown into the water; *Held*, that plaintiff might show that since the accident the steamboat company had used a gang plank with handrails, and constructed with the design of preventing similar accidents.

Where it appeared that the accident was due to the negligence of a deck hand in pulling in the plank, without observing that plaintiff was on it, *Held*, that exemplary damages could not be given.

It seems, that if the deck hand had seen plaintiff standing on the plank, and had pulled it in with the intention of throwing him into the water, it would be a malicious act, for which the steamboat company would not have been liable.

APPEAL by defendants from a judgment of the general term of the Marine Court, affirming a judgment entered on the verdict of a jury.

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The action was to recover damages for the negligence of the defendants, whereby, as plaintiff was passing along the plank or platform extending from the pier to defendants' boat, the plank was suddenly withdrawn, and plaintiff precipitated into the water.

On the trial, the plaintiff was allowed (against defendants' objection) to amend his complaint by inserting an allegation that, in consequence of the occurrence, he "was prevented and incapacitated from attending to his business." The other facts necessary to an understanding of the case are stated in the opinion.

Henry H. Anderson, for appellants.

A. D. W. Baldwin and *A. R. Lawrence, Jr.*, for respondent.

BY THE COURT.*—DALY, CH. J.—Where the damages, though the natural consequences of the act complained of are not necessarily the result of it, they must be particularly specified in the complaint, that the defendant may not be taken by surprise. It is not traversable matter, but must be inserted in the complaint, that the defendant may be prepared with evidence to rebut the proof offered of such special damage or the amount or extent of it (*Molony v. Dows*, 15 How. Pr. 265; *Squier v. Gould*, 14 Wend. 159; *Vanderslice v. Newton*, 4 N. Y. 130). The amendment allowed was an averment of this nature (*Strang v. Whitehead*, 12 Wend. 64), and a judge may allow such an amendment upon the trial when no injury will result to the defendant from it (*Miller v. Garling*, 12 How. 203). It is in the discretion of the court (*Lounsbury v. Purdy*, 18 N. Y. R. 521), and if any injury will arise by allowing such an amendment, such as the absence of witnesses who would have been present had the complaint originally contained such an averment, it is incumbent upon the defendant to advise the court of the situation in which he will be placed if the amendment should be allowed and proof given under it. Where he

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does nothing of the kind, but simply interposes a general objection, I do not think that he is entitled to a new trial, for it may be reasonably assumed, that if any injury arose from allowing the amendment, he would have stated it to the court, and that the court would not allow him to be taken by surprise. To this extent I approve of the practice recognized and acted upon in *Miller v. Garling, supra*.

There was no error in allowing the plaintiff to show that the defendants, since the occurrence of this accident, use a different kind of gang plank, with large guards upon the side of it to prevent accidents like the one which took place in this case. Evidence of this description was allowed in *Hazman v. The Hoboken Land, &c. Company*, a case in this court recently affirmed in the Court of Appeals (50 N. Y. 53).

The judge charged the jury that they might give damages to the full extent of the jurisdiction of the court, if they were satisfied that the accident was the result of the intentional, willful, or malicious conduct of the defendants's servant or servants. This was instructing them that they might, if they came to that conclusion, give exemplary or punitive damages; and that the jury were influenced by this part of the judge's charge, is inferable from the fact that they gave damages to the full extent of the jurisdiction of the court.

There was nothing in the evidence to warrant any such conclusion, or to call for such instruction, and it was specially objected to by the defendants. The question in the case was, whether the boat-hand pulled the gang plank from the string piece whilst the plaintiff was on the plank, in the act of going on board the steamer as a passenger, or whether the plaintiff heedlessly, it being somewhat dark, stepped upon or attempted to get on it, after it was separated from the string piece of the wharf, and whilst the defendants' servants were in the act of drawing it into the boat, not perceiving that they were doing so, and not hearing, being somewhat deaf, the precautionary warning that was given, and which was heard by one of his own witnesses.

If the latter were the true state of facts, the plaintiff himself was the sole cause of the accident, but if it was otherwise,

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if, as he testified, after he had got two or three steps on the plank, it was suddenly jerked in, and the consequence was that he was thrown into the water, then the utmost that can fairly be inferred is, that it was an act of negligence on the part of the boat-hand; the sudden pulling in of the plank without perceiving that there was a person upon it, which may have arisen from the darkness at that hour, or from the want of looking carefully before undertaking to draw in the plank. The order, "haul in the plank," had been given by the captain, and the plaintiff's own witness heard the man who dragged it in call out, "stand clear," so that a general warning was given, and there was nothing in the case from which it could in any way be inferred that the conduct of the boat-hand, in the language of the judge, was intentional, willful, or malicious. If it had been, that is, if the conduct of the servant proceeded from a willful or wanton design on his part to injure the plaintiff and imperil his life, by throwing him into the water, then it is doubtful, to say the least of it, if there could be any recovery at all against the employer, for though the drawing in of the plank was an act in the course of the servant's employment, the intentional drawing it in such a way as to toss the plaintiff in the water, was connecting with it a willful and wanton intention to injure for which the master may not be responsible (*Isaacs v. The Third Avenue Railroad Co.* 47 N. Y. 122; *Vanderbilt v. The Richmond Turnpike Company*, 2 N. Y. 479). But it is unnecessary to consider the question, as there was nothing in the evidence to warrant the conclusion that it proceeded from any such motive. To warrant the jury in awarding what is variously called punitive, vindictive, or exemplary damages, or damages beyond what will be compensatory, there must be something in the circumstances showing or affording some foundation for a conclusion on the part of the jury that there was either an intention to injure, or that gross and reckless disregard of person or property, which is equivalent to the same thing, being equally culpable. Such enhanced damages are given for the benefit of the community. They are inflicted by way of punishment, that they may operate as a restraint upon the defendant, and by way of example to

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him and to all others, and therefore the plainest principles of justice require that they should be imposed only in cases where it is palpable that there was a design on the part of the defendant or his servant to injure, or a consciousness of the probable consequence of his act, and an indifference to the result, which was equally reprehensible (*Wallace v. The Mayor of N. Y.* 2 Hilt. 440; *Morford v. Woodworth*, 7 Ind. 83; *Moody v. McDonald*, 4 Cal. 297; *Jackson v. Schmidt*, 14 La. 806; *Emblen v. Myers*, 6 Hurlst. & N. 54, 38; Mayne on Damage, p. 13; Shearman & Redfield on Negligence, § 600, and note). Nothing of the kind appeared in this case, and the judgment, therefore, should be reversed.

Judgment reversed.

JOHN C. GILLESPIE v. JOHN S. WINBERG.

The term "ship's husband" is used to designate the person who, in the home port where the vessel belongs, does what the owner would otherwise do—obtains a cargo for her and attends to everything essential to the due prosecution of the voyage for which the cargo has been obtained. Whilst the ship is abroad the master is empowered to do all that is essential during the voyage. He may be said to be then the ship's husband, except so far as he may be limited by his instructions, and if the duties which he would otherwise discharge in a foreign port with respect to the vessel, such as entering her at the customs, collecting the freight, obtaining a cargo and clearing the vessel, are, by the owners' directions entrusted to a person at that port, then she is consigned to that person, and he is properly called the "consignee."

Such a person is the one meant in the act to amend the pilot laws (Laws of 1857, p. 502, ch. 243), which provides that pilotage shall be paid by the master, "owners or consignees," where the master refuses to take a pilot upon coming into the port of New York by way of Sandy Hook.

It being provided by the original act of 1853 (Laws of 1853, p. 925, ch. 467, § 18), to which the act of 1857 is amendatory, that the pilotage shall be payable by the master, owner, consignee or agent *clearing the vessel*. The term "consignee,"

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as there used, means the consignee of the vessel, and not of the goods, and the term "consignees" in the amendatory act must be taken to mean those upon whom, under that designation, the duty of paying pilotage was previously imposed.

In an action under the act of 1857, for refusing to take a pilot on board, it appeared that the defendant was a ship broker who had procured a cargo for the vessel and cleared her at the custom house for Baracoa, where she took in a cargo, and that upon returning here with a cargo consigned to a third person, the captain reported to the defendant, who collected the freight and paid the bills for the vessel and cleared her for another voyage. Upon coming into New York on her return from Baracoa, she refused a pilot; *Held*, that the defendant was the consignee within the meaning of the act, and the action was properly brought against him.

The act of 1857 is to be liberally construed, since it is a remedial statute, both in the fact that it is amendatory of a defect in an existing law, and that the statute of which it is amendatory, is in the nature of a public regulation for the protection of life and property, which may be put in peril from the want of proper precaution in navigating vessels entering the harbor of New York. Such a statute is to be liberally and beneficially construed and everything is to be done in advancement of the remedy, that can be done, consistently with any construction that can be put upon it.

APPEAL by plaintiff from a judgment of a District Court.
The facts are stated in the opinion.

BY THE COURT.*—DALY, CH. J.—It appeared from the evidence that the pilot was on pilotage ground when he hailed the vessel, and as the justice, in denying the motion for a non-suit, was of the opinion that the master pretended not to hear the pilot, there was a palpable violation of the provisions of the act of 1857. As the justice afterwards dismissed the complaint, it must have been the ground that it appeared to him by the subsequent testimony that the defendant was not the consignee within the meaning of the 29th section of the act, and the point to be examined, therefore, is whether the justice was right in that conclusion.

That section (Laws of 1857, p. 502, ch. 243) provides that "All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a

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licensed pilot; or in case of refusal to take such pilot, shall himself, owners or *consignees*, pay the said pilotage as if one had been employed, and that such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel."

The vessel came from Baracoa with a cargo of fruit consigned to a Mr. Pearsall, of this city. The master upon his arrival reported to the defendant, who is a ship's broker, and who, it appears, had, at the captain's request, obtained the charter for this voyage; the master signing the charter party as master and agent of the vessel, the owners of which reside in the State of Maine. She was cleared at this port by the defendant, and as he obtained the charter for her, and the captain, upon her arrival here, reported to him, he, in all probability, entered her at the customs, but the fact does not appear in the evidence. It appears from the defendant's testimony that he paid her bills and that the freight was paid to him by Pearsall, the consignee of the cargo, circumstances which show that he acted to this extent as the agent of the owners. He was asked if he would have paid a bill for pilotage had one been presented, and answered "I do not know what is the custom;" upon which he was asked if he had ever paid pilot bills before, and he replied "that he had very often, but not for this vessel to his knowledge." He was asked "What do you consider the consignee of a vessel to be?" and he answered "Where the cargo comes to."

Consignor and *consignee*, in the ordinary mercantile acceptance of these words, signifies the shipper of merchandise and the person to whom it is addressed. *To consign*, in the mercantile law, is ordinarily to send or transmit goods to a merchant or factor for sale, and a consignee is consequently the person to whom they are consigned, shipped or otherwise transmitted. The radical meaning of the word "to consign," which is of French origin, is to deliver or transfer as a charge or trust (Landar's *Dictionnaire de la Langue Francais*; Burrill's *Law Dictionary*); and the common definition of it by English lexicographers is, "to commit, intrust, give in trust (Crabbe's *Synonyms*; Soule's *English Synonyms*, Boston, 1871; Smith's

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Synonyms Discriminated, N. Y. 1871; Webster's Dictionary, unabridged; Richardson's Dictionary). It is, as Crabb comprehensively defines it, "transferring from oneself to the care of another." When used in connection with a vessel, it generally refers to the goods which are shipped by her, for the vessel itself is in the charge of the master, who is, with respect to it, the agent of the owners, and clothed, by virtue of his appointment, with authority to do, whilst the vessel is abroad, whatever is essential in the prosecution and protection of the interests of his employers.

But both vessel and cargo may be consigned to a person at the port of destination, and where that is the case he is styled amongst merchants the consignee (McElrath's Dictionary of Commercial Terms); or the vessel alone may be consigned, and where a person is authorized to take charge of her upon her arrival, to collect the freight, pay all her expenses, obtain a cargo for her, and who, by virtue of this authority, enters and clears the vessel at the customs, he may, I think, be termed the consignee, for she is for that purpose and to that extent consigned to him.

Where duties of this description are discharged at the home port or place where the vessel belongs, by a person appointed by the owners, he is known by the maritime term of the "ship's husband" (Story on Agency, § 35; Abbott on Shipping, Part I, c. 3, p. 105, 8th Lond. ed.; 1 Bell's Com. 410, 411, §§ 426, 428, 429, 4th ed.; Id. 504, 505, 5th ed.; 1 Parsons on Shipping and Admiralty, 109). "He is, as it were," says Beawes, "a steward at land to the owner of the ship, as the officer bearing that name is on board when the ship is at sea (Beawes' Lex Mercatoria, p. 47); and as the power of the master to enter into contracts, &c., is superseded in the port of the owners, so is it by the presence of the ship's husband (1 Bell's Com. id).

From the nature of the powers delegated by the owners to the ship's husband, who, in virtue of his employment, by long established usage, sees to the outfit for the voyage, the furnishing of provisions and stores, engages the master and crew, collects the freight, adjusts averages, enters into charter par-

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ties, or engages the vessel for general freight, clears her at the customs, and pays all bills and charges, whether he is in funds or not, the vessel may be said to be consigned to (that is, intrusted to) him, and there is no violation of language in calling him also a consignee, for such he is in fact, as the vessel, within the generic and ordinary meaning of the word, is consigned to him for the purposes and objects above stated. Savary, in defining the various significations of the French word "consigner," says, "On dit aussi en ce sens, consigner un vaisseau, le remettre entre les mains du marchand qui doit en faire le chargement" (Savary's Dictionnaire Universel de Commerce, Amsterdam, 1726). And the same definition is given in Laudais, one of the most recent of French lexicographers.

So far as my information extends, this "expressive maritime phrase," as Story calls it, of "ship's husband," is used only to designate the person who, in the home port, where the vessel belongs, does what the owner would otherwise do, obtains a cargo for her, and attends to everything essential to the due prosecution of the voyage for which the cargo has been obtained, and it is as designating a person of this description residing at the place where the vessel belongs, that the term is used in the statutes of the United States (Act of 31st of Dec., 1792, § 3; Dunlop's Laws of the U. S. p. 107). According to Beawes, he "collects the freight both at home *and abroad*, pays all the ship's disbursements, and makes out an account of all these transactions for his employers, the owners of the ship" (Beawes' Lex. &c. p. 47).

Whilst the ship is abroad, the master is empowered to do all that is essential during the voyage. He may be said to be then the ship's husband, except so far as he may be limited by his instructions; and if the duties which he would otherwise discharge in a foreign port, with respect to the vessel—such as entering her at the customs, collecting the freight, obtaining a cargo, and clearing the vessel—is, by the owners' directions, intrusted to a person at that port, then, in my judgment, she is consigned to that person, and he may, with entire propriety, be called the consignee.

When the statute imposes upon the consignee, as well as

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upon the master and the owners, the obligation of paying pilotage, where the master refuses to take a pilot upon coming into this port, it is obvious that what the statute means, is a person to whom the vessel is consigned. The general act of 1853, of which this act of 1857 is merely amendatory, declares that the pilotage shall be payable by the master, owners, consignee or agent entering or clearing the vessel (Laws of 1853, p. 925, ch. 467, § 18). By the word consignee, as here used, is evidently meant the consignee of the vessel, where there is one, and not a consignee of the goods shipped by her, of whom there may be a great number. It would, I think, be an unreasonable interpretation of the statute, to hold that it meant to impose the obligation of paying pilotage upon any and every one having goods consigned by her. The general statute having declared who are to pay the pilotage, we must suppose that the subsequent act requiring the payment of pilotage, where the master refuses to take a pilot, meant by consignees those, upon whom, under that designation, the duty was previously imposed; that is, the consignee, or consignees of the vessel, where there are persons holding that relation to her in this port.

There is nothing in the evidence to show that Pearsall, the person to whom the cargo was consigned, had anything to do with the care, management, employment, or earnings of the vessel. All that appears is that he paid to the defendant the freight for the transportation of the merchandise which was consigned to him. As the entire cargo was consigned to him, he may have entered into a charter party for the carriage of it from Baracoa to this port, but even that cannot be assumed, for it may have been, from all that appears in the case, that the charterer was another person. The defendant was asked if the schooner was consigned to him, and he answered: "No, sir. To Mr. Pearsall the cargo comes to." He was then asked what was his business, and replied: "Ship broker. The captain comes to me to procure a charter for her;" and afterwards, in reply to another question, he said: "The captain signs the charter party as master and agent of the vessel. I am not the agent or owner." When asked how he construed his name

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upon the manifest, he answered: "Because the vessel was cleared by us," and added further that she had been cleared by him twice since. It may be inferred from this, which is all that there is respecting the chartering of her, and from the other evidence, that the defendant, upon being applied to by the captain, obtained a charter for the carriage of a cargo of fruit by the schooner from Baracoa to New York; that the defendant cleared the vessel at this port; that upon her arrival here in the completion of that voyage, the captain reported to him; that the cargo was consigned to Mr. Pearsall; that Pearsall paid the freight for the carriage of it to the defendant, and that the defendant had cleared the vessel twice from this port since. There is nothing, in my judgment, upon this state of facts, to warrant the conclusion that Pearsall was a consignee chargeable with the payment of pilotage within the meaning and intent of the statute. The fact that the entire cargo was consigned to him did not make him the consignee of the vessel, any more than if he had simply been the consignee of a single box of merchandise transmitted by her. His relation to her was nothing more than that of any other consignee of goods transported by a vessel, which was simply to receive his merchandise and pay the freight for its carriage.

The question then remains, was the defendant the consignee within the meaning of the statute, and it appears to me that the duties which he discharged respecting her in this port, were ordinarily of the kind which appertain to a consignee of a vessel, as contradistinguished from a consignee of the cargo in whole or in part. The French definition of Savary, previously quoted, of the consignee of a vessel, is one in whose hands a vessel is put to obtain a cargo for her. This was one of the duties which the defendant discharged. The interpretation to be put upon his testimony is that the captain came to him to procure a charter for the schooner. That, having done this, the defendant cleared the vessel for Baracoa, where she took in a cargo, and that upon returning here in the completion of that voyage, the captain reported to the defendant, who thereupon did what would be done by the consignee of a vessel at the port of destination; he collected the freight, paid

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the bills, and cleared the vessel, for, as we may suppose, another voyage or adventure. Whether he was authorized to do this by the owners, or by the master, does not appear by the evidence, nor is it material to inquire. It is sufficient, so far as he is concerned, that he assumed to do what he did as the agent or representative of the owners, and by doing so constituted and made himself the consignee of the vessel in this port.

In determining what is meant by the term consignee in the statute, we are to be guided by the general rule which prevails in the construction of a statute, which is to consider the mischief which it was designed to suppress, and the nature of the remedy it meant to apply; and in doing this, this statute is to be largely and not strictly construed, for it is a remedial statute, both in the fact that it is amendatory of a defect in an existing law, and that the statute of which it is amendatory is in the nature of a public regulation for the protection of life and property, which may be put in peril from the want of proper precaution in navigating vessels entering the harbor of New York. Such a statute is to be liberally and beneficially construed, and everything is to be done in advancement of the remedy that can be done, consistently with any construction that can be put upon it (*Thorpe v. R. & B. R. R. Co.* 27 Verm. 147; *Stuyvesant v. The Mayor of New York*, 7 Cow. 604, 605; *Hart v. The Mayor of Albany*, 9 Wend. 571; *Gillett v. Moody*, 3 N. Y. 479; *Van Hook v. Whitlock*, 2 Edw. 304; *Johns v. Johns*, 3 Dow. 15; Dwarries on Statutes, by Potter, pp. 73, 74, 184, 185).

The design of this amendatory act of 1857 was to make it obligatory upon every master of a foreign vessel or one from a foreign port, or any vessel sailing under register bound to or from the port of New York by the way of Sandy Hook, to take a pilot, and that there might be no motive for evading this regulation, it was enacted that if such master should refuse to take a pilot; pilotage should be paid by the master, the owners, or consignees, the same as if one had been employed, giving a right of action to recover it to the pilot first speaking or offering his services to the vessel. Consignees were evidently included, from the difficulty and in many cases im-

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possibility of collecting the pilotage, by action from the owners or masters of foreign vessels, and because consignees, from the relation which they hold to the owners, and the fact that the freight collected at the port of destination usually comes into their hands, are able to protect themselves.

This was the defendant's position. He collected the freight and paid the bills. His business is that of a ship's broker, and he testified that he has paid bills for pilotage very often; so that he knew that this was one of the charges against a vessel coming into this port, and having the means in his hands wherewith to pay it, he would have been justified in doing so, as it was an obligation imposed by law. In my judgment he was a consignee, within the meaning and intent of the statute, and for that reason, in my opinion, the judgment should be reversed.

Judgment reversed.

EDWARD STRONG v. THOMAS SPROUL AND OTHERS.

In an action against defendants, as trustees of a corporation formed under the general manufacturing act (Laws of 1848, ch. 40), for neglect to make, file and publish the yearly report required by § 12 of that act, it was set up as a defense that during all the time of the alleged default of the defendants to comply with the provisions of the statute, one A. B. was also a trustee of the company and should be made a party defendant. *Held,*

1. That this was a mere dilatory plea, in which great strictness should be exacted in requiring the presentment of every material fact essential to such a defense, and was bad unless it showed that the person claimed to be jointly liable was living.
2. That the liability of the defendants in such a case was in tort and not on contract, and that a non-joinder of some of them constituted no defense.

APPEAL by defendants from an order declaring frivolous certain defenses set up in the answer, and ordering judgment thereon. The facts are stated in the opinion.

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Niles & Bagley, for appellants.

A. R. Dyett, for respondent.

BY THE COURT.*—ROBINSON, J.—This action is founded upon a claim by plaintiff, as creditor of a corporation formed under the general manufacturing act of 1848 (chap. 40), against the defendants, as trustees, for neglect to make, file and publish the yearly report required by the 12th section of that act.

The order appealed from adjudged the third, fifth and sixth defenses, interposed by the answers of the defendants, frivolous, and gave judgment against them accordingly.

As to the third defense, that the indebtedness of the company was secured by mortgage, and as to the fifth, setting up the existence of the same mortgage, with the further allegation that the plaintiff had not exhausted his remedy against the company or recovered a judgment on his claim against it, no considerations were presented on the argument in their support, and they were manifestly frivolous.

As to the sixth defense, that during all the time of the alleged default of the defendants, as trustees, to comply with this provision of the statute, "one L. D. Fredericks was also a trustee of said company, and should be made a party defendant in this action."

The defense of the non-joinder of a co-contractor, may be interposed in an action upon contract, but it is a mere dilatory plea, in which great strictness is exacted, requiring the presentation of every material fact essential to such a defense. It must truly disclose all of such co-contractors jointly liable with the defendant, and neither more or less, in order that, on amendment, no such objection as to parties may again arise (*Mechs. & Farmers' Bank v. Dakin*, 24 Wend. 411; *Hawks v. Munger*, 2 Hill, 200). It must aver that the person alleged to be omitted as a necessary defendant, is living (3 Ch. Pl. 900 n. f.), and must leave nothing to intendment. Even a complaint by which it appears there was another joint contractor in respect to

* Present, DALY, Ch. J., ROBINSON and J. F. DALY, JJ.

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the debt sued on, where it does not appear affirmatively that he was living when the action was commenced, is not liable to demurrer, for defect of parties (*Burgess v. Abbott*, 1 Hill, 476; *Brainard v. Jones*, 11 How. Pr. 569; *Scofield v. Van Syckle*, 23 Id. 97; *Strong v. Wheaton*, 38 Barb. 616).

In *Taylor v. Richards*, 9 Bosw. 679, the answer, while not alleging that the persons claimed to be liable with the defendant were living, yet stated that they *all resided in the city of New York*, and the court held the averment sufficient. Nothing of that character appears in this sixth statement of a defense, nor is there any suggestion of any matter of fact importing that Fredericks was still living, in the mere legal conclusion that "he should be made a party defendant."

Besides, although this statute makes the defaulting trustees "jointly and severally liable" for the debts of the company, such liability does not arise upon contract, but by way of penalty, for the omission of a duty imposed by statute (*Merchs. Bk. of N. H. v. Bliss*, 35 N. Y. 412; *Nimmons v. Tappan*, 2 Sweeny, 652), and being *ex delicto*, a defense by way of abatement for non-joinder of others equally guilty, furnished no ground of defense, especially as no benefit could accrue to the defendants sued, from such joinder, through any right to contribution from the other wrong-doers as co-defendants, or otherwise, as none such exists (*Colburn v. Patmore*, 1 Crompt. Mees. & Ros. 73; 2 Greenl. Ev. § 115; *Wehle v. Haviland*, 42 How. 399, 410).

In *Andrews v. Murray*, 33 Barb. 354, it was expressly held by the general term of the Supreme Court of this district, that a trustee (defendant) of such a corporation liable for a similar default, had no such right of contribution against a co-trustee; so that the liability of the trustees being as wrong-doers, and as in respect to all other torts, "joint and several," a non-joinder of some of them in an action brought therefor, constitutes no defense (1 Ch. Pl. 487; 2 Greenl. Ev. § 115).

The order appealed from was also in this respect correct, and should be affirmed, with costs.

Order affirmed.

Brown v. Elliott.

HERVEY BROWN AND ANOTHER v. JAMES ELLIOTT.

The plaintiffs occupied the first story and basement of a store in which the second and upper stories were occupied by defendant, and in an action for negligence on the part of the defendant in allowing the croton water to overflow and flood the plaintiffs' premises, the defendant pleaded that the plaintiffs, at the time of the injury, had under their control the stop-cock regulating the flow of water to defendant's premises, and could at pleasure shut it off, and that the injury was caused by the negligence of the plaintiffs in failing to make use of the stop-cock or to make a proper use thereof; *Held*, that under these pleadings the defendant could prove an agreement on the part of the plaintiffs to turn off the water at night by the stop-cock under their control, so as to prevent it from flowing to the defendant's premises.

In an action for injury to goods, general and gross estimates made by a witness, without examination or knowledge of their kind, or quality, or of the particular extent of injury to the several articles in respect to which such estimates are made, cannot be admitted as proof of the damage sustained.

Under a general denial in an action for damage to plaintiffs' goods, defendant can show that the goods injured did not belong to plaintiffs. Such defense need not be specially pleaded.

APPEAL by defendant from a judgment entered on a verdict at trial term.

Action for negligence.

The facts are stated in the opinion.

C. Bainbridge Smith, for appellant.

Aug. F. Smith, for respondents.

BY THE COURT.*—ROBINSON, J.—This action was brought by plaintiffs, who were tenants occupying the first story and basement of a store in this city, against defendant, the occupant of the second and upper stories, for injury to their goods occasioned by an overflow of water on to their premises from defendant's premises, occasioned, as is alleged, by the negligence of the defendant or his agents or servants, whereby plaintiffs' goods were damaged and they were interrupted in the enjoy-

* Present, ROBINSON, LARREMORE and J. F. DALY, JJ.

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ment of their premises and business, and put to expense in removing and selling the damaged goods.

The answer denied the occurrence of any such accident in the manner charged, and alleged that if any damage was caused thereby it was the result of plaintiffs' negligence; it also set up that plaintiffs, at the time of the injury had under control the stop-cock connecting with the water flowing on to defendant's premises, and controlling its flow, and that they had it in their power to control it at pleasure, and to prevent its flow on to their premises from those of the defendant, and if any injury was caused thereby, it was through their negligence in failing to make use of the stop-cock, or in failing to make proper use thereof.

The evidence adduced at the trial showed that plaintiffs had on their premises such a stop-cock entirely controlling the flow of water up on to defendant's premises; that on the night of the accident it was not turned so as to cut off the water from its upward flow; that another cock on defendant's premises that allowed the water to flow into and pass off through a urinal was left open on the night of the occurrence, and that by reason of the accidental stoppage of the waste holes in the urinal by a piece of segar, the water being left running, overflowed the urinal and ran down on to, and through, the floor and into plaintiffs' premises below, occasioning the injury complained of, and that this occurred during the night time when all the parties, as was customary, were absent from the premises. The evidence established the neglect of the defendant in allowing the water-cock on their premises to remain open and the flow of water through the urinal to be obstructed by a piece of segar, as the *immediate* cause of the injury.

The matter first presented for consideration upon the exceptions is the refusal of the judge to admit evidence tending to show contributory negligence on the part of the plaintiffs in omitting a service or duty which it was claimed they had previously assumed and performed until the night of the accident, in stopping off the flow of water up to defendant's premises by the stop-cock on their premises. The averment that the injury was caused by plaintiffs' failure to use these means of avoiding

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such an accident, is set up in the answer. The judge appears to have regarded this alleged assumption of duty on the part of the plaintiffs as matter that ought to have been specially pleaded, and ruled that the testimony offered as to plaintiffs' negligence, founded on their voluntary agreement, was inadmissible. Various offers tending to establish such assumption of duty, were made, but rejected, and in my opinion, erroneously.

In an action of tort for negligence, evidence that the acts or omissions of the plaintiffs contributed to the injury, is admissible under a general denial that the injury complained of was occasioned by the defendant. The right of recovery depends on plaintiffs' establishing, at least by *prima facie* proof, that he in no respect by his own negligence contributed to the injury, but that it was occasioned *solely* by the defendant's acts (*Button v. Hudson R. R. Co.* 18 N. Y. 248; *McDonell v. Buffum*, 31 How. Pr. 154; *Deyo v. N. Y. Central R. R. Co.* 34 N. Y. 9; *Grippen v. Same*, 40 N. Y. 34). Such exemption from liability was equally available to this defendant, if the injury complained of was in any way attributable to plaintiffs' neglect in turning off the water by the main stop-cock on their own premises. Whether regarded as a primary duty arising from having the entire control, or as one they had *gratuitously* assumed and were in its ordinary performance for the accommodation of the defendant (Ed. on Bail. 94). One assuming the voluntary performance of an act or duty for another, engages for such skill and attention as it ordinarily requires, and if it be in respect to a matter for which the defendant is under contract or obligation with himself, he cannot make claim for any malfeasance or neglect to which he has himself been a party or contributed. In an action of tort for negligence in performance of such duty, the fact that plaintiff contributed to the injury would be available under a general denial that it was caused by the defendant's neglect, and without special defense of such secondary intervention of the plaintiff in aid of the primary duty or obligation the defendant had assumed. Such a general denial does not confess and avoid the cause of action, but presents the principal fact or transaction upon which an action for negligence is founded as evidence that the injury com-

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plained of was not occasioned solely by the default of the defendant and without plaintiff having in any respect contributed to it.

Under these considerations, if, as was attempted to be shown, the plaintiffs had so assumed the control and management of the flow of water up to the defendant's premises as to have relieved the defendant from vigilance and care as to the minor details of the water works on his premises, and from apprehension of any such accidental injury resulting from the water being left running, and an overflow being occasioned by a piece of segar falling into the urinal, plaintiffs' omission of such duty constituted a fair subject for the consideration of the jury as an act of contributory negligence, and the evidence offered ought to have been admitted (*Rudolphy v. Fuchs*, 44 How. Pr. 155).

The plaintiffs were also allowed, under objection and exception, to introduce proof as to damages the goods had sustained, upon general and gross estimates by the witness, made without examination or knowledge of the kind or quality or of the particular extent of injury to the several articles in respect to and upon which such estimates were made. The plaintiff, Hervey Brown, was asked, Q. "What was the amount of damaged goods? Objected to; objection overruled; defendant excepts." "They amounted to \$29,954 82. Q. Did you examine these goods, so that you are able to give an estimate of the amount of damages these goods suffered from the water? A. I did not go into a minute examination of them as far as that goes, because the variety of goods was so great that the damage on some would be less, and others a great deal more; some of these goods were damaged fifty per cent. and some not ten. Q. What per cent. on the whole would be a fair amount on the whole to compensate for the loss? Objected to; objection overruled, and defendant excepts. A. I should think near twenty-five per cent." This was error. He was not shown competent to speak on the subject from any knowledge or examination of the goods, or the extent of injury each particular lot had sustained, so as to enable him to make a specification of the injuries or of each item constituting the gross sum or percentage on the whole as to which he was permitted to

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testify (*Teerpenning v. Corn Ex. Ins. Co.* 43 N. Y. 279; *Wehle v. Haviland*, 42 How. Pr. 399). He had disclosed his ignorance and inability to give legal evidence on the subject; and the answer to the last question could lead to but one result; to place himself in the stead of the jury, to assess in gross the plaintiffs' damages (*Decker v. Myers*, 31 How. Pr. 378).

The plaintiffs were permitted to prove and recover, as part of their damages, the amount of injury to goods in their store belonging to a co-occupant, F. W. Smith, who did business there on his own account. They neither had possession nor any right of possession of these goods, and the charge that as to such goods defendant was bound specifically to set up such want of title in plaintiffs, was erroneous.

There are some other errors in the numerous rulings of the judge to which exceptions were taken, as to which, any particular discussion is unnecessary, as the foregoing considerations are controlling in principle, and afford sufficient direction on a new trial, which should be ordered, with costs to abide the event.

Judgment reversed.

GEORGE FLEWELLING v. WILLIAM C. BRANDON.

By the district court act, as amended in 1862 (L. 1862, ch. 484, § 8), which provides that the rules and regulations of the Supreme Court shall apply to the District Courts as far as they can be made applicable, a subsequent action cannot be brought in a District Court while the costs, due in a prior action for the same subject-matter, which action has been discontinued with costs, remain unpaid.

APPEAL by plaintiff from a judgment of a District Court. The facts are stated in the opinion.

BY THE COURT.*—LARREMORE, J.—It is admitted by the record that on the day this action was commenced, a previous action for the same subject-matter was discontinued with costs, which have not been paid.

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

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It was insisted on the argument that the present action was prematurely brought, on the ground that the costs of the former action not having been paid, said action was still pending. Such an objection has been held to be valid, as applied to suits in courts of record (*Averill v. Patterson*, 10 N. Y. 500, and cases there cited), but would not be sustained in a court of a justice of the peace (*Youle v. Brotherton*, 10 Johns. 363).

If the District Courts of the city of New York are of no higher authority and jurisdiction than a court of a justice of the peace, then the plea of a former suit pending was properly overruled by the court below.

The act in relation to said District Courts passed April 13, 1857 (Laws of 1857, ch. 344, § 45), provides for a dismissal of an action, with costs, and without prejudice, where the plaintiff "voluntarily discontinues the same before it is finally submitted."

If there had been no further legislation on the subject, the plaintiff's right to bring this action could scarcely be questioned.

By the 3d section of "An act in relation to the courts in the city and county of New York," passed April 24, 1862 (Laws of 1862, ch. 484, § 3), it is provided that "the rules and regulations of the Supreme Court of this State shall apply to said District Courts, as far as the same can be made applicable." And by the 16th section of said act, any justice of said courts may open defaults and impose costs as a condition thereof. It is evident, then, that said courts, to the extent of their jurisdiction, should be governed by the rules of practice of the Supreme Court of the State, and as the objection raised would have been valid in the latter court, I see no reason why, in view of the 3d section of said act of 1862, it may not be successfully urged in the present case. An opposite theory would serve to invite litigation by irresponsible parties, without furnishing any adequate protection to a defendant.

I am of opinion that this action was prematurely brought, and that the judgment therein should be reversed.

With this view it is unnecessary to consider the second branch of the appeal.

Judgment reversed.

Coughtry v. Levine.

JOHN COUGHTRY v. JULIUS LEVINE AND OTHERS.

The defendants agreed to employ the plaintiff in their business, and to pay him as a salary and compensation for his services, a sum which should be equal to one-half of the net profits of said business, after deducting every expense and loss connected therewith, as follows: The sum of \$8,000 yearly, and every year during the continuance of said agreement, in weekly installments, at the rate of \$8,000 per annum, and only at that rate for a shorter period than a year, and to pay any balance of said salary beyond said sum of \$8,000 per year, if realized at the end and only at the end of each year, and if not then realized, whenever thereafter the same should be realized. The business engaged in was that of "enameling and linen-finishing paper collars," to which the plaintiff was to devote his exclusive time, knowledge and ability. The plaintiff worked for the defendants in pursuance of this agreement, for several months, and in a suit for the balance of the salary due, at the rate of \$8,000 per year, the defendants set up that the business had been unprofitable, and therefore there was nothing due the plaintiff: *Held*, That the fair interpretation of the agreement was, that the defendants, having confidence in the plaintiff's skill and ability to manage the business successfully, and believing that it would realize an annual net profit of at least \$6,000, employed him at a fixed compensation equal to one-half of that amount. The increase of the salary was made to depend upon the excess of profits over \$6,000, but in any event the plaintiff was to be paid at the rate of \$8,000 per year.

APPEAL by defendants from a judgment of the general term of the Marine Court, affirming a judgment entered on the verdict of a jury.

The facts are stated in the opinion.

A. R. Dyett, for appellants.

Edward D. McCarthy, for respondent.

BY THE COURT.*—LARREMORE, J.—The only question presented on this appeal is that which involves the construction of the agreement set up in the complaint and admitted by the answer.

* Present, DALY, Ch. J., ROBINSON, and LARREMORE, JJ.

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The defendants therein agree with the plaintiff to enter into and carry on business, &c., and to employ the plaintiff in said business, and to pay him as a salary and compensation for his services a sum which shall be equal to one-half of the net profits of said business, after deducting every expense and loss connected therewith, as follows: the sum of \$3,000 yearly, and every year during the continuance of said agreement, in weekly installments, at the rate of \$3,000 per annum, and only at that rate for a shorter period than a year, and to pay any balance of said salary beyond said sum of \$3,000 per year, if realized, at the end and only at the end of each year; and if not then realized, whenever thereafter the same shall have been realized.

The plaintiff agreed to devote his whole time and ability to said business, and all his information and knowledge to make the same profitable to defendants, to keep and render accurate accounts thereof; that he would not engage in any other business, and would accept as a compensation for his services the provisions and payments as above mentioned.

It was further agreed between the parties, that if said business should prove profitable, &c., that it should continue for three years from July 1, 1869, unless sooner terminated as therein provided.

The plaintiff worked for the defendant in pursuance of said agreement from July 1st to November 20th, 1869, when he was discharged by them. He was paid \$640, and the judgment herein was rendered for the balance alleged to be due him under said agreement.

The said business was conceded to be unprofitable, and for this reason the plaintiff's right to recover is disputed.

Was his salary, to the extent of \$3,000, independent of the profits of said business, as a compensation fixed and to be paid in any event, or was the whole transaction a mere business venture on his part, dependent upon the realization of profits.

In applying the rule laid down in *Blossom v. Griffin* (13 N. Y. 569), let us see, in view of all the surrounding circumstances and pre-existing relations between the parties, whether

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the plaintiff is not entitled to such a construction of the agreement as will sustain his right of action.

The business engaged in was that of "enameling and linen finishing paper collars," to which plaintiff was to devote his exclusive time, knowledge, and ability. He was employed by defendants for this purpose. They did not engage to advance any capital, and were not required to devote any time or attention to the business. Unless we regard his compensation to the extent of \$3,000 as fixed and certain, there would be no mutuality in the contract, nothing to offset plaintiff's knowledge of the business, and the exclusive devotion of his time and attention thereto.

Although his salary is declared to be "a sum which shall be equal to one-half of the net profits of that business," yet this clause must be construed as explained by the following clause, as the entire contract should be considered in determining the meaning of any or of all its parts (2 Pars. on Cont. 13).

Effect should be given, if possible, to every part of the agreement (*Nounenbocker v. Hooper*, 4 E. D. Smith, 401).

It is provided that said sum of \$3,000 per annum shall be paid in *weekly* instalments. A payment ordinarily implies the delivery and receipt of money, by agreement of the parties to the transaction, in extinguishment of an existing debt. How could such weekly payments be said to depend upon the profits, when no provision is made in this agreement for any weekly accounting, or for any refunding of the moneys so paid, in the event of a loss in the business, or for any future accounting?

I think the fair interpretation of this agreement to be this:

The defendants having confidence in plaintiff's skill and ability to manage said business successfully, and believing that it would realize an annual net profit of at least \$6,000, employed him at a fixed compensation, equal to one-half of said amount, the increase of which was made to depend upon the excess of net profits over \$6,000.

The judgment should be affirmed.

Judgment affirmed.

Sheridan v. Charlick.

JAMES SHERIDAN v. OLIVER CHARLICK.

A coachman, after having used his master's horse and carriage in going upon an errand for his master, instead of taking it to the stable, used it in going upon an errand of his own, without his master's knowledge or consent. While doing so, he negligently ran into and injured the plaintiff's horse. *Held*, that his master was not liable.

If a negligent act be done by a servant while he is at liberty from service and pursuing his own ends exclusively, the master is not liable for the injury produced thereby, even if it could not have been committed without facilities afforded to the servant by his relations to his master.

The case of *Mitchell v. Crasweller*, 18 C. B. 237, approved and followed.

APPEAL by defendant from a judgment of the general term of the Marine Court, affirming a judgment entered on the verdict of a jury.

The facts are stated in the opinion.

A. J. Vanderpoel, for appellant.

The defendant was not liable, and the nonsuit should have been granted.

Schouler's Domestic Relations, p. 639, states the rule of law applicable to the facts.

Some cases might lead to the belief that a master is liable for the careless driving of his servant, because he entrusts him with the carriage. This is not correct. The true principle is, that while a master is liable when the servant is in the line of his employment at the time of committing an injury, though he may go out of his way and do his work in an improper and roundabout manner, yet this liability does not extend further. Take, for example, a late case where the master sent his carman and clerk to deliver some wine and bring back some empty bottles, and on their return, when about a quarter of a mile from the office, the carman, instead of doing as he was bidden, and putting up the horses, was induced by the clerk to drive in quite another direction on business of the clerk's,

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and thus injured a person in the street; the master was held not to be liable (*Sleath v. Wilson*, 9 Car. & P. 607; *Storey v. Ashton*, 4 Law. Rep. 2, B. 476; see *Mitchell v. Crasweller*, 13 C. B. 237; 16 E. L. & Eq. 448; *Whatman v. Pearson*, Law Rep. 3 C. P. 422; *Limpus v. London, &c. Co.* 1 Hurl. & Colt. 526; *Patten v. Rea*, 2 C. B. (N. S.) 606, 40 E. L. & Eq. 329; *Bard v. Yohn*, 26 Penn. State, 482; *Crockett v. Calvert*, 8 Ind. 127; *Wright v. Wilcox*, 19 Wend. 343.

J. S. Bryan, for respondent.

BY THE COURT.*—J. F. DALY, J.—The plaintiff in the court below obtained a verdict for \$250 damages, for the negligent driving of defendant's horse and carriage by defendant's servant, by which a horse belonging to plaintiff was killed. The accident occurred on the evening of March 29th, 1871, at the corner of 7th avenue and 27th street. The plaintiff drove up 7th avenue, and when he arrived at 27th street went across the west railroad track to go down 27th street, where he stabled, but when his horses reached the cross-walk, the defendant's coachman, driving defendant's horse before defendant's wagon, came very rapidly down 7th avenue, and a collision occurred, the shaft of the wagon ran into plaintiff's horse, who subsequently died of the wound. The evidence establishes a strong case of negligence on the part of defendant's coachman, and the only question in the case is, whether defendant can be held liable for the act. The testimony of the coachman, which is entirely undisputed, shows that when the collision occurred he was not driving the horse on his master's business, but on an errand of his own. He says, "I was directed towards the latter part of that afternoon, by Mr. Charlick, to take his horse and wagon and go on a message to Hunter's Point R. R. depot, to get a map for him and some other papers. I took his horse and wagon and went out of the stables on 33d street around into 34th street, and so down in a direct line to 34th street ferry to Hunter's Point. This was about twenty minutes past six o'clock. I got the maps and papers at

* Present, VAN BRUNT, LARREMORE, and J. F. DALY, JJ.

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Hunter's Point, and came back immediately the same way, and got home and delivered the message to Mr. Charlick about half-past seven o'clock, p. m. He was in his room. He did not send me anywhere else that night. I afterwards took the mare and wagon, and went on an errand for myself down 7th avenue to 24th street. Q. "Had this anything to do with Mr. Charlick's business?" A. No, sir, nothing in the world." There is no contradiction of this in any part of the case. The coachman swears the mare needed exercise, but also swears that this trip down 7th avenue to 27th street was on an errand for himself, and there is nothing to show that it was taken to exercise the horse. The defendant stated to plaintiff, as plaintiff's witness, O'Gara, swears, that he, defendant, did not know the reason of the coachman going down to 27th street, and said he had no business there. There is no contradiction of all this by any witness. It therefore appears, that while the coachman was the servant of defendant, and was driving the defendant's horse and wagon, yet he was not, when the accident occurred, going to or returning from any place by defendant's order or on defendant's business, or in pursuance of his employment as coachman, but had fully performed all he was directed to by defendant, and, instead of taking the horse to the stable, was driving upon an errand of his own in an entirely different direction, without defendant's knowledge or consent. Upon these facts it seems to me that defendant is not liable (Sherman & Red. on Neg. § 63, and cases cited; *Mitchell v. Crassweller*, 13 Com. B. 237). The text book here cited observes, that "if the act be done while the servant is at liberty from service, and pursuing his own ends exclusively, there can be no question of the master's freedom from liability, even if the injury could not have been committed without facilities afforded to the servant by his relations to his master." The case cited above was, that where a carman having finished the business of the day, returned to his employer's shop with the horse and cart, and obtained the key of the stable, which was close at hand, but instead of going there at once and putting up the horse, as it was his duty to do, he, without his master's knowledge or consent, drove a fellow workman to Euston Square,

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and on his way back ran over and injured the plaintiff and his wife; and it was held (all the judges concurring) that, inasmuch as the carman was not at the time of the accident engaged in the business of his masters, they were not responsible for the consequences of his unauthorized act.

The judgment should be reversed.

Judgment reversed.

On a motion for a re-argument, or for leave to appeal to the Court of Appeals, the following opinion was delivered:

BY THE COURT.*—J. F. DALY, J.—There seems to be no reason for a re-argument of this appeal. The judgment below was reversed by us upon the authority of *Mitchell v. Crassweller*, 13 C. B. 237. That case was decided long after the cases of *Joel v. Morrisson*, 6 Carr. & P. 501, and *Sleath v. Wilson*, 9 Carr. & P. 601. In the latter case, a verdict was given for the plaintiff upon the charge of Erskine, J., that “where the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it; the ground is that he has put it in his servant’s power to mismanage the carriage by intrusting him with it; he was acting in the course of his employment until he had deposited the carriage in the Red Lion stable.” In that case the facts were these: the coachman drove his master to Great Stamford street; his orders were to put up at the Red Lion stable in Castle street, Leicester square, and meet his master at the Olympic theatre; he went, instead, into Old street road on business for himself. He was, therefore, actually sent to a certain place by his master and made a deviation from the road on his own affairs, all the time having the carriage out on his master’s business. So in *Joel v. Morrisson*, the servant was going out of his way when driving on his master’s business, and his master was made liable. But in *Mitchell v. Crassweller*, the carman was taking the horse to the stable “after the business of

* Present, DALY, Ch. J., LARREMORE, and J. F. DALY, JJ.

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the day was done," and instead of going to the stable, took a fellow-workman home, and afterwards, on his way back to the stable, ran against the plaintiff. Maule, J., says, "At the time of the accident he was not going a roundabout way to the stable nor making a detour. He was not engaged in the business of his employers." Jervis, J., says, "If the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business." And the master in that case was held not liable. So in this case, the coachman of the defendant Charlick had duly performed his errand, had returned and delivered his message, and, having no further instructions, instead of taking the horse up to the stable, drove down Seventh avenue on an errand of his own, and while so going down, ran against the plaintiff's horse. I can only repeat the words of Williams, J., in the case of *Mitchell v. Crassweller*, "I should be extremely sorry if any authority could be found which would compel us to hold that this man was at the time of the accident, which occurred through his breach of duty, acting in the employ of defendant."

The motion for a re-argument is denied, but as there does not seem to be any decision of our court of last resort, upon a question which has been very thoroughly discussed in England, I am in favor of permitting the plaintiff to appeal to the Court of Appeals.

Myres v. DeMier.

MARIA J. MYRES v. JUAN C. DEMIER.

A court of equity may enforce specific performance of a contract to sell land, although the land is situated in another State, and the contract was made and to be performed there, if the defendant was duly served and subjected to the jurisdiction of the court.

A party wishing to rescind a contract on the ground of a failure to perform at the time fixed by the contract, must show either, 1. That time was originally of the essence of the contract; or, 2. That it was engrafted into it by subsequent notice; or, 3. That the delay has been so great as to constitute laches.

Under a contract to sell property which provided for a delivery of a deed at a specified time, but contained no other stipulation showing any intention to make performance on that day essential, but provided that in a certain contingency the deed might be delivered after that date, *Held*, that time was not of the essence of the contract.

The subsequent notice required to make time of the essence of the contract, must be express, distinct, and unequivocal.

The question as to what will amount to such notice, in a particular case, considered.

APPEAL by plaintiff from a judgment entered on the decision of a judge at special term. The judge, at the trial, found as matters of fact, that about December 3d, 1869, Austin Myres (plaintiff's testator) and the defendant were the owners of the New Jersey Arms and Ordnance Company at Trenton, New Jersey, the defendant owning nine-sixteenths and Myres seven-sixteenths. On that day they entered into a contract, by which Myres agreed to sell his interest to the defendant for \$55,000, to be paid as follows: \$4,000 in cash, \$6,000 on delivery of the deed, and the remainder, or \$45,000, to be secured by bond and mortgage, the mortgages to run three years, and the interest to be payable semi-annually in New York, to be further secured by the assignment of policies of insurance on said property, for the sum of \$25,000. The deed was to be delivered Feb. 1, 1870, or as soon as it could be done after the return of Myres from Europe. In case the deed was not delivered by Myres at the time aforesaid, it was pro-

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vided that defendant might sell the personal property upon payment of the \$6,000. Contemporaneously with the making of the agreement, Myres wrote to the defendant a letter, saying that he was going to Europe, to be gone about two months, and that in case the defendant could dispose of the machinery at Trenton before Myres' return, he might do so, the same as if he had paid the \$6,000.

Under this contract, defendant having paid the \$4,000 in cash, went into and retained possession of the property.

On the return of Myres from Europe, Jan. 18th, 1870, the defendant paid him the further sum of \$6,000 provided for in the contract.

No deed was tendered the defendant until February 27th, 1870, when a deed of bargain and sale with a covenant against the grantor's own acts was offered the defendant, whereupon the defendant claimed that the conveyance required by the contract should contain certain covenants of seizin, quiet possession, and fuller assurance of title, and a surrender of certain bonds of The Trenton Locomotive and Machine Manufacturing Company. The difference existing between them as to the requirements of the contract, and as to the covenants to be contained in the deed of a conveyance, continued as matter of dispute until March 11th, 1870, when a written notice from Myres to the defendant (dated March 10, 1870) was received by the defendant, in which Myres stated that, having been informed that defendant declined to accept the deed, and give the mortgage according to the contract, if the defendant did not do so at once, he (Myres) would be obliged to take steps to enforce the agreement of December 3d, 1869.

A number of the bonds of The Trenton Locomotive and Machine Manufacturing Company, through whom the title of said parties was derived, eight of which were held by the Ocean Bank, of the city of New York, and some others by Myres, remained outstanding and unsatisfied, which had been secured by a mortgage on the premises, dated April 1, 1856, executed by said corporation to Joseph B. Brearly, Trustee; and said premises had been also subject to another mortgage, executed by the New Jersey Arms and Ordnance Company,

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remaining unsatisfied of record, but the title acquired to said premises and property, by said Myres and defendant, in and through a deed or conveyance thereof from Edward J. C. Atterbury, a receiver of the last-mentioned company, dated October 31st, 1867, made and executed under and by virtue of the Court of Chancery of the State of New Jersey, conveyed said property free and clear of all incumbrances and liens whatsoever. And the objections made by the defendant to the title of said Myres, by reason of said bond and mortgages, were not sustained by any proof of the existence of any such defect therein.

The action was commenced on March 24th, 1870, by summons for relief and a complaint by Austin Myres (plaintiff's testator), setting forth in substance his ownership as aforesaid, the contract aforesaid with the defendant, the payment of said sums of \$4,000 and \$6,000 on account thereof; that defendant, under said contract, had gone into possession of the property so agreed to be sold him; the tender of the deed aforesaid and demand of the bond and mortgage of \$45,000, and continued neglect and refusal of the defendant to accept the deed and deliver the bond and mortgage, or to carry out or perform the contract on his part; but that he repudiated and claimed to rescind the same on his (defendant's) part; that since such refusal he (defendant) had negotiated a sale of the personal property (fixtures and machines), and had entered into contract for its sale and delivery (including the interest of said Austin Myres) to the Turkish Government, and had delivered a portion thereof and received a part of the purchase money, and was engaged in the removal thereof beyond the jurisdiction of this court.

That such contract was in violation of his (said Myres) rights in the property, and such removal would result in irreparable injury, and he prayed for an order of injunction restraining the removal of any of said property from the factory or premises aforesaid, or bringing it into the State of New York, or from the selling or delivering the same, or any part thereof, to any government, corporation or individual, and that defendant account for the proceeds of said property.

After the commencement of this action and before an-

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swer, to wit, on April 4th, 1870, the defendant tendered the bond and mortgage and policies of insurance mentioned in said contract to said Austin Myres, but he refused to accept the same.

Prior to the commencement of this action, and about March 23d, 1870, the defendant had sold and delivered to the Turkish Government all the personal property referred to in said contract, for the sum of \$68,000, and had received the consideration money therefor.

That the claim of the defendant for the additional covenants in the conveyance to be executed under said contract, and for the surrender of said bonds, was made in good faith and under advice of counsel; that no substantial injury occurred to said Myres from defendant's default to accept said deed when tendered on the 27th day of February, 1870, and executing the bond and mortgage specified in said contract of December 3d, 1869.

That the tender of such bond and mortgage with accompanying policies of insurance, as made on the 4th of April, 1870, if accepted, would have substantially secured to the said Austin Myres all the benefits conferred by the said contract.

That defendant, by assurances given him during the progress of the negotiation for said sale by said Austin Myres, had reason for believing that the said bonds of said Trenton Locomotive and Machine Manufacturing Company, held by said Ocean Bank and said Austin Myres, would be surrendered to him.

He also found as matters of law:

That no such delay occurred in the completion of said contract, by or on the part of the defendant, as called for a judgment forfeiting his rights under the same as purchaser in possession of the property agreed to be sold to him, or from requiring a specific performance thereof.

That said Austin Myres, previous to the commencement of this action, gave no notice of, nor claimed any rescission of said contract, or of any desire or intention to do so.

That the original complaint was not for any such rescission.

That the tender of performance, made on the 4th of April,

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1870, before answer, was complete as to all his legal or equitable demands of the plaintiff.

That specific performance of said contract, by the plaintiff prayed for in the answer, ought to be decreed, but by reason of the delay in the tender of the bond, mortgages and policies of insurance, without costs.

D. Pratt, for appellant.

The defendant, by his failure to perform the contract on his part after time had been made material by the other party, has, by the well-settled rules of courts of equity, forfeited the contract and all rights under it.

1. It is not claimed that, generally, time is the essence of a contract for the sale of land, but it is submitted that it is competent for the parties to such a contract to make it so, and when the contract is for the sale of personal as well as real property, time is generally essential (Parsons on Cont. pp. 344, 543; Story's Equity, § 776).

2. But in this case it is manifest, from the nature and condition of the property, and the provision for the sale of the personalty by DeMier in certain contingencies, that the parties contemplated a prompt execution of the contract at the time therein specified (*Gale v. Archer*, 42 Barb. 320; *Hepwell v. Knight*, 1 Young & C. 415; Hoffman Ch. R. 125). (a.) Instead of such prompt execution on the part of the defendant, his whole conduct shows a determination on his part to embarrass Myres, if not the design to evade an honest performance of it. (b.) Indeed, it looks much as though DeMier desired a delay until he could make sure of the sale of the personalty and the receipt of the money, and if he should fail in that speculation to abandon the contract.

3. At all events, after repeated efforts to induce defendant to accept a conveyance and execute back his bond and mortgage, Myres had the right to appoint a time beyond which there should be no further delay. Such time was appointed by Johnson on the part of Myres, and assented to by DeMier. (a.) That such a time was fixed DeMier does not deny. (b.) Nor

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Does he deny that Johnson was ready at the time appointed, and he was not ready. 2. Nor does he pretend to tender any excuse for not being ready.

4. Time, therefore, by this appointment became material, and the refusal of DeMier to perform on his part worked a forfeiture of the contract. *Winnell v. McGowan*, 2 Barb. 271; *Fries v. Rider*, 24 N. Y. 277; *Bennett v. Lynch*, 1 Johns. Ch. 275.

5. Again, as DeMier was in default, he was clearly bound to act promptly upon receiving Myres' letter of March 1st. That was a direct notice that delay on his part would be tolerated no longer (2 Story's Eq. § 775. (a.) It is not material that Myres threatened in that letter that, in case of further neglect, he should take measures to compel performance. (b.) It was a notice that he should consider any further delay a breach of the contract. Such breach on defendant's part gave Myres his election to rescind or compel performance. (c.) Defendant comes with an ill grace, claiming that he could utterly disregard the warnings in that letter, and at the same time retain all his rights under the contract.

6. At all events, the commencement of the action on the 24th day of March, was an unmistakable notice to DeMier of an intention on the part of Myres to rescind, and he was certainly bound to act promptly and efficiently from that time. Allowing ten days to elapse before any offer to perform, was not prompt action. (a.) A party guilty of default, who asks specific performance, must show that he has been ready, desirous, prompt, and eager to perform the contract (2 Story Eq. Jur. § 776; 5 Ves. 720, note; 13 Id. 228; 1 Ball & Beat. 68; 4 Peter, 311). (b.) There is no excuse given for the delay on the part of the defendant, and especially after he was notified that delay would no longer be tolerated. (c.) The delay was therefore manifestly intentional and wilful, and the court will never relieve against wilful laches (3 Ves. 690, 695, note 2).

Chas. Tracy, for respondent.

By the Court.*—*LARREMORE, J.*—Prior to December 3d,

* Present, VAN BRUNT, LARREMORE and J. F. DALY, JJ.

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1869, plaintiff's testator and the defendant were the owners of certain real estate and personal property at Trenton, N. J. On that day, the said owners entered into a contract whereby Myres agreed to sell his said interest (being $\frac{7}{16}$) to the defendant, for \$55,000, to be paid as follows: \$4,000 on the execution of the contract, \$6,000 on delivery of the deed, and the balance, \$45,000, to be secured by a bond and mortgage upon the property and policies of insurance to the amount of \$25,000. "The deed to be delivered February 1st, 1870, or as soon as it may be done after the return of the party of the first part (Myres) from Europe; and in case said deed is not delivered by said Myres at the time aforesaid, said DeMier may sell and dispose of the personal property upon payment of \$6,000, in addition to the \$4,000 paid this day to said Myres or his agent duly authorized to receive the same." Myres returned from Europe before February 1st, 1870, and the second cash instalment of \$6,000 was paid before the delivery of the deed, and on January 18th, 1870, as shown by the receipt.

Plaintiff claims that a proper deed was tendered to defendant on February 1st, 1870, and also at a subsequent date agreed upon by the parties, which deed defendant refused to accept. That by such refusal (after notice to close the sale by the time specified) defendant had forfeited his rights under said contract, and that plaintiff was entitled to a rescission thereof.

The learned justice who tried the cause has found, as matters of fact, that no such deed as was required by said contract was tendered the defendant, until on or about February 27th, 1870, and that differences existed between the parties as to the form and character of said deed, and continued as a matter of dispute until March 11th, 1870, when defendant received a written notice from Myres, dated March 10th, 1870, that he would be obliged to take steps to enforce the agreement, unless defendant would accept the deed, &c. That defendant, under said contract, entered into and has ever since continued in possession of the rights and interests in said real and personal property, and that on or before March 23d, 1870, he had sold and delivered all the personal property, referred to in said contract, to the Turkish Government for the sum of \$68,000, and

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had received the consideration money therefor. That this action was commenced March 24th, 1870, by the plaintiff's testator, praying for an injunction restraining defendant from selling, delivering, or removing said property, and for an accounting of the proceeds thereof. That after the commencement of this action, and before answer, to wit, on April 4th, 1870, the defendant tendered the bond and mortgage and policies mentioned in said contract, which Myres refused to accept. These facts fairly present the questions raised on the argument of the appeal.

That the court had jurisdiction of the action is settled by the case of *Norton v. Bronson* (13 N. Y. 587), which holds that a court of equity may enforce specific performance, although the lands are in another State, and the contract was made and to be performed there, if the defendant was duly served and subjected to jurisdiction.

The point upon which the case turns, is whether or not time was made essential to the performance of the contract. In order to sustain the affirmative of this proposition, it must appear, 1st, that time was originally of the essence of the contract; or 2d, that it was ingrafted into it by subsequent notice; or 3d, that the delay was so great as to constitute laches.

The contract in suit specified February 1st, 1870, for its performance, but contained no other stipulation showing any intention to make performance on that day essential. By its very terms, it contemplated and provided for a contingency, by which the deed might be delivered after that date. Time was not therefore originally of the essence of the contract (*Hearns v. Tenant*, 13 Ves. 287; *Roberts v. Berry*, 16 Beav. 31; *Parkin v. Thorold*, Id. 59; *Leggett v. Edwards*, 1 Hopk. Ch. 530; *Edgerton v. Peckham*, 11 Paige, 352).

Did it become essential by subsequent notice?

This is a question of evidence (*Levy v. Linds*, 3 Mer. 81), and the justice has found as a conclusion of law that, previous to the commencement of the action, plaintiff's testator gave no notice of, nor claimed any rescission of said contract, or of any desire or intention to do so. He has also found that there was

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no such delay by or on the part of the defendant as called for a judgment of forfeiture against him.

If these findings are supported by competent evidence, the decision ought not to be disturbed, unless it appears that gross error has been committed, or great injustice done.

The plaintiff seeks a forfeiture of the contract under which defendant entered into possession of the premises, and upon which he has paid the sum of \$10,000. There has been a part performance by him, and nothing remains to render it complete but the delivery of the bond and mortgage and policies called for by said contract. Under such circumstances it is eminently just that plaintiff should be held to strict proof of the facts that warrant a forfeiture.

Did Myres give such a notice of his intention to rescind the contract as made time essential to its performance? The testimony of Johnson upon this point was, that previous to March 10th, 1870, he informed defendant that he (Johnson) would come down on the day named with all the papers ready to close the sale, and that if upon that occasion defendant wasn't ready, it was the last time he would come; that he (Johnson) had been dancing attendance upon defendant for the last two months, and should refuse to do it any longer.

This was not a sufficient notice to rescind the contract. Such intention was not expressed in it. The notice required must be express, distinct, and unequivocal (Fry on Spec. Per. § 728, and cases there cited).

It was held, in *Reynolds v. Nelson* (6 Mad. 18), that where one party informed the other that non-payment by a day certain would be considered as equivalent to a refusal to perform, this did not amount to a notice that the contract would then be considered as rescinded. On March 10th, 1870, Myres wrote defendant that he had been informed by Johnson that defendant declined to perform the agreement, and then adds, "if you do not do so at once, I shall be obliged to take steps to *enforce* the agreement, which I dislike very much to do, as I am tired of lawsuits."

It will not, I think, be seriously contended that Myres' expressed intention on March 10th, 1870, to *enforce* the agree-

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ment, is consistent with the theory that it had been previously rescinded.

But even if time had been made essential to the performance, this might be and was waived by the conduct of Myres (*Benedict v. Lynch*, 1 Johns. Ch. 370; *More v. Smedburgh*, 5 Paige, 640), affirmed in 23 Wend. 238; *King v. Wilson*, 6 Beav. 124).

Myres' letter of March 10th, 1870, treated the contract as still subsisting, and this gave defendant a right to ask for specific performance (*Burgett v. Bissell*, 14 Barb. 638).

The authorities upon which the appellant's counsel relies, do not, in my judgment, meet the merits of this action.

In *Gale v. Archer* (42 Barb. 320), it was the peculiar nature of the contract that made time essential, and the court so stated.

Wiswall v. McGown (1 Hoff. Ch. 125), holds that the notice to rescind should fix a day for performance, and the time should be reasonable. But the justice has found as a fact that no such notice was given prior to defendant's offer to perform.

Friess v. Rider (24 N. Y. 367) was an action at law upon a contract for sale of real estate, to recover stipulated damages by reason of the vendor's failure to perform at the time, &c. In such actions time is always essential.

Wiswall v. McGown (2 Barb. 270) holds that a new agreement extending the time for performance is evidence that the parties deemed the time material; but no excuse was offered for the failure to perform on the day named.

Taking into consideration the fact that this action was not commenced to rescind the contract, but that such relief was sought by amendment of the proceedings after defendant had made a tender and offer to perform on his part, and also the fact, that said contract can be carried out according to its terms, I think the judgment rendered was fully authorized by the evidence, and should be sustained.

Judgment affirmed.

Board of Commissioners of Pilots v. Frost.

BOARD OF COMMISSIONERS OF PILOTS v. FROST.

By the first section of the act for the regulation of the port of New York (2 Laws of 1857, p. 487, ch. 671, § 1, as amended by 1 Laws of 1872, p. 998, ch. 409), two distinct offenses are prohibited, and separate penalties imposed for each; 1. Throwing ashes or cinders into the waters of the port; and 2. Putting ashes &c. into the water through a pipe or opening.

The penalty for a violation of the second provision is incurred only after service of the notice required by the act, but in order to recover the penalty under the first provision, no notice is required.

For the commission of the offense prohibited by the first provision, the master as well as the owners of the steamboat is liable; but for a violation of the second provision, a personal liability is fastened on the owners only.

Throwing ashes or cinders into the water through an opening cut in the deck, is an offense within the first provision of the statute, for which the master is liable.

APPEAL by plaintiffs from a judgment of the 7th District Court. Action against the defendant, master of the steamboat Daniel Drew, to recover \$50 as a penalty for throwing ashes and cinders into the waters of the port of New York.

The facts proved on the trial were, that on August 15th, 1872, cinders and ashes were thrown from the steamboat Daniel Drew, of which the defendant was master, into the water of the port of New York. They were thrown into the water through a hole cut in the deck in front of the boilers.

The justice held that this was an offense prohibited by the second clause of the act (Laws of 1857, ch. 671, § 1, as amended by laws of 1872, ch. 409), and as no service of the notice provided for in the act was proved, dismissed the complaint.

George W. Blunt, for appellants.

Abraham Van Santvoord, for respondent.

BY THE COURT.*—ROBINSON, J.—Section one of the act entitled "An act to establish regulations for the port of New York," passed April 16th, 1857, as amended by chap. 409 of the Laws of 1872, purports to prohibit distinct offenses and

* Present DALY, Ch. J., ROBINSON and LOEW, JJ.

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impose separate penalties for each. The first clause makes it unlawful to throw or cause to be thrown into the waters of the port of New York below Spuyten Duyvil creek on the Hudson river, or below Throg's Point on the East river, or in the bay inside of Sandy Hook, any cinders or ashes from any steamboat, and imposes a penalty of \$50 for each and every such offense, for which the *master and owner* of such steamboat is made liable. The second provision enacts that, "any steamboat using or having any pipe or opening, so constructed as to admit of putting ashes or cinders through the same into the water is made liable to a fine of \$50 for each and every time such pipe or opening shall be used for such purpose within the limits aforesaid, after service on the master or owner of such steamboat of a notice by said commissioners of pilots not to use the same, to be recoverable by the commissioners in an action against the owners of such steamboat," and such "steamboat (it is declared) shall also be liable therefor." These provisions are independent of each other, and each refers to a particular grievance, which it prohibits, and furnishes a separate and distinct mode of conviction and redress. The proof established the commission of the offense prohibited by the first clause or subdivision of this section, and the liability of defendant as master of the vessel for the penalty imposed. As to the offense referred to in the latter clause, the master is not made responsible. The "fine" which it inflicts is only recoverable "against the owners of such steamboat," "and such steamboat is made liable therefor." How this liability to the "fine" is to be enforced against the owners, "*or in rem*" against the vessel, it is unnecessary to determine. No such notice as the second clause prescribed was made or attempted to be made as a prerequisite to the offense or liability to the penalty mentioned in the first clause. The evidence, however, showed the commission of the offense first inhibited and the defendant's liability as master for the penalty imposed therefor. The dismissal of the complaint by the justice for lack of proof of service of the notice required by the second clause was erroneous, and the judgment should be reversed.

Judgment reversed.

Milnor v. The New York & New Haven R. R. Co.

M. CLEILAND MILNOR v. THE NEW YORK & NEW HAVEN
R. R. Co.

A railroad corporation, incorporated under the laws of another State, but allowed by our laws to extend and operate its road in this State, is subject to our laws and within the prohibition of our statute against exercising corporate powers beyond such as are expressly conferred by law or are necessary to the exercise of the general powers conferred, and a contract made by them in violation of such prohibition is *ultra vires* and void.

Defendants, a railroad corporation organized under the laws of Connecticut, for the purpose of constructing a railroad from New Haven, by way of Bridgeport, westerly to the line dividing the State of New York from Connecticut, were afterwards, by a law of this State, authorized to extend their railroad into this State. *Held*, that they came within the provisions of our law in respect to domestic corporations, and that they could not, in this State, make a contract for the carriage of passengers or their baggage beyond the limits of their own road.

Where a railroad company assumes the duty of a carrier of freight and persons between certain points, established by their charter, and without special agreement to the contrary, their obligation commences when the freight or passenger is accepted for transportation, and terminates when safely delivered at the end of their route, and they are only liable as forwarders beyond the end of their line, unless under a lawful contract extending their liability.

The right of a passenger purchasing coupon tickets for different roads and sold at the office of one, is precisely the same as if the tickets had been purchased at the office of each road.

APPEAL by plaintiff from a judgment entered upon the decision of a judge at trial term.

The defendants, a railroad corporation created under the laws of the State of Connecticut to operate a railroad between New Haven and the State line between New York and Connecticut, and by the laws of this State (Laws of 1846, chap. 195), authorized to extend their railroad into this State, were sued for the loss of baggage, occurring by fire at Sheffield, in the State of Massachusetts, by plaintiff, who had purchased the usual coupon tickets sold by them in New York City, for a passage from New York to Sheffield. These tickets

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were printed on one slip of paper, and capable of being readily detached, and were in the following form:

<p>"NEW YORK & NEW HAVEN R. R." Housatonic Check. New York to Bridgeport. Sheffield. JAS. H. HOYT.</p>	
<hr/>	
<p>HOUSATONIC RAILROAD. Sheffield. Change Cars at Bridgeport. Good for this trip only. H. D. AVERILL.</p>	

Defendants also attached to the baggage of the plaintiff a railroad check marked as follows: [H. R. R. 166.]. The plaintiff was carried on the railroad of the defendants to Bridgeport, and there, with his baggage, was transferred to the Housatonic Railroad, and arrived at Sheffield. The train on that day was delayed by some unavoidable accident, and instead of arriving at 9.20 P. M., the regular time, did not arrive until about one o'clock at night. The baggage was taken into the depot of the Housatonic Company there, and about an hour after the arrival of the train at Sheffield was accidentally destroyed by a fire which consumed the depot and contents.

The other facts necessary to an understanding of the case are stated in the opinion.

W. S. Palmer, for appellant.

Calvin G. Child, for respondents.

BY THE COURT.*—ROBINSON, J. [after stating the above facts]. —The statement of facts discloses that defendants operate a railroad between New York city and New Haven, which, at Bridgeport, connects with the Housatonic railroad, operated by the Housatonic Railroad Company between Bridgeport and Pittsfield, Massachusetts, passing through Sheffield; that for the convenience of passengers and themselves, and by agree-

* Present, ROBINSON and LARREMORE, JJ.

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ment between the defendants and the Housatonic Company, the defendants sold through tickets from New York to Sheffield, at the rate of \$3 60 per ticket, out of which they deducted \$1 70, their share, and paid the balance to the Housatonic Company, and it was under this arrangement that the ticket in question was sold.

The judge who tried this cause, without a jury, under these facts found as matters of law, that the defendants sold the ticket from Bridgeport to Sheffield as the agent of the Housatonic Company, and checked the baggage as such agent.

The main exceptions are to these conclusions of law from the facts stated. There do not appear any other special circumstances tending to fix any other liability upon the defendants, or to show that they in any other way agreed to carry the passenger or his baggage from Bridgeport to Sheffield, than that upon application for such passage tickets, those mentioned were sold to him, and his baggage was thereupon checked with a check of the Housatonic Company. Although the defendants are not a corporation of this State, and are only through the comity of the laws of the State authorized to extend and operate their road therein, they are yet within the prohibition of our statute against exercising corporate powers beyond such as are expressly conferred by law, or are necessary to the exercise of the general powers conferred (1 R. S. 600, § 3), and are prohibited from maintaining suits for, or in respect to, any such acts (2 R. S. 457, § 2). Public policy would also debar any actions against them for acts done here, in violation of the prohibitions of our statutes against domestic corporations. All persons dealing with corporations are bound to take notice or have knowledge of their corporate powers, as they must exist in positive statute.

The defendants, as appears from the act of 1846, were incorporated for the purpose of constructing a railroad from New Haven, by way of Bridgeport, westerly to the line dividing the State of Connecticut from New York, and there is nothing in the evidence offered in the present case indicating that they ran their cars over any part of the Housatonic road between Bridgeport and Sheffield, or even exercised the functions of common carriers thereon.

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The act of 1847, chap. 270, § 9, provides that any railroad receiving freight for transportation (meaning necessarily within the scope of its corporate powers) shall be entitled to the same rights and be subject to the same liabilities as common carriers, and further authorizes it to make contracts for carrying freight to any place upon the line of any connecting railroad. Where they do run their cars and transact business upon the lines of other roads, they have been held to a like responsibility upon contracts relating thereto (*Hart v. Rens. & Sar. R. R. Co.* 8 N. Y. 37), but I am unable, under these express limitations and prohibitions, to discover any other general powers in railroad corporations, as common carriers of passengers, to contract for transporting *passengers* beyond the line of their own road, although in some cases they are required to purchase and sell tickets of other carriers (see act of 1863, chap. 573 ; 7 R. S. (Edm. ed.) 317).

The contract between the defendants and the Housatonic Company did not establish any community of interests or profits between them ; it had only relation to the respective charges, or rather the proportionate division of the charge or amount, to be exacted from the through passenger to be carried from the line of the one to some other place on that of the other. The coupon tickets sold in the present case sufficiently evidence such separate undertaking, and that they had each been issued under authority of the respective companies. They constituted full notice, if such were necessary, of the separate obligations of the several companies. The case of *Hood v. The New York & New Haven Railroad Company*, 22 Conn. 1, though much criticised as a restriction upon railroad corporations in contracting for the carrying of freight or passengers beyond their *termini*, is yet authoritative as a construction by the courts of Connecticut upon the corporate powers of the defendants, and that they had not the unrestricted powers of contracting as common carriers at large, and has been followed in *Converse v. Norwich & N. Y. Trans. Co.* 33 Conn. 166.

Irrespective of these considerations limiting the operation of contracts made by railroad corporations, as *ultra vires*, it would seem to be well settled that in the ordinary assumption of the duty of a carrier of freight and persons between certain

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points established by their charter, and without special agreement to the contrary, their obligation commences when the freight or passenger is accepted for transportation, and terminates when safely delivered at the end of its route, and it is only liable as forwarder beyond the end of its line, unless under a lawful contract extending its liability as carrier (Redf. on Com. Car. §§ 181–183; *Burroughs v. N. & W. R. R. Co.* 100 Mass. 26; *Hempstead v. N. Y. Central R. R. Co.* 28 Barb. 485; *Dillon v. N. Y. & Erie R. R. Co.* 1 Hilt. 231; *Salinger v. Simmons*, 2 Lans. 497). As to the right of a passenger purchasing coupon tickets for different roads, and sold at the office of one, it is precisely the same as if the tickets had been purchased at the office of each road (2 Redf. on R. R. § 185; *Schopman v. Bost. & Wor. R. R. Co.* 9 Cush. 24; *Sprague v. Smith*, 29 Verm. 421; *Knight v. P. S. & P. R. Co.* 56 Maine, 234; 2 Redf. Am. R. R. Ca. 458; *Straiton v. N. Y. & N. H. R. R. Co.* 2 E. D. Smith, 184; *Root v. Gt. Western R. R. Co.* 45 N. Y. 524).

Under these considerations the judgment should be affirmed, with costs.

Judgment affirmed.

HERMAN FUNK v. MARIO BRIGALDI.

In the consideration of the question, whether certain articles, which in their nature are chattels, have become part of the freehold by mere attachment and ordinary use therewith, for the general purpose to which it is adapted and employed; the intention of the owner, evidenced by according acts, is sufficient to so appropriate and convert them into fixtures annexed to the freehold, that they will pass by deed to a grantee.

During the negotiations for the sale of a house, plaintiff (the owner) as an inducement to defendant to purchase, told him that the house was complete and ready for him to move into, and that all he had to do was to walk in and light the gas, as it was complete. Defendant purchased the house and plaintiff brought an action to recover the gas fixtures, on the ground that they did not pass by a deed of the house; *Held*, that plaintiff's statement made during the negotiation for and as an inducement to the purchase, was sufficient evidence that the gas fixtures had been attached to the house to enhance the general value of the estate, and not for its temporary use, and that therefore they became attached to the freehold and passed by a deed of it.

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APPEAL from a judgment. The facts are stated in the opinion.

BY THE COURT.*—ROBINSON, J.—The facts of the case are briefly these. Plaintiff sold defendant a dwelling-house and lot, No. 407 Sixty-first street, in this city, and while negotiating the sale and as an inducement to the purchase, informed defendant that “the house was complete and ready for him to move into, and that all he had to do was to walk in and light the gas, as it was complete.” The contract of purchase made no allusion to any gas fixtures, but some few weeks after the sale, and after defendant had been in possession, plaintiff for the first time asserted ownership of the gas fixtures in the house; made a demand of the defendant for their redelivery, which was refused, and then brought this action to recover damages for their wrongful detention. They consisted of chandeliers and brackets that could be unscrewed from the gas-pipe, “without injury to anything else.” On the trial, the question eliciting the preliminary conversation, and plaintiff’s before-mentioned statement inducing the purchase, was objected to on his part, but allowed, to which he excepted, and on this appeal his counsel claims it was inadmissible, as tending to vary the written contract of sale. He refers to *Shaw v. Lenke* (1 Daly, 487) decided at general term of this court in 1865, as controlling. That case held that as between grantor and grantee, the mere conveyance did not *ex proprio vigore* grant “gas fixtures” as *fixtures*, under the legal import of the term, and as part of the realty. To the same effect are *Montague v. Dent* (10 Rich. (S. C.) 135); *Vaughan v. Haldeman* (33 Penn. 522); *Rogers v. Con* (40 Miss. 91); but *contra*, *Hays v. Doane* (3 Stock. (N. J.) 96); Wash. on Real Prop. (3d ed.) 17. The case of *Shaw v. Leake*, *supra*, must be followed, so far as it controls the question presented in this case, but it does not assume to prevent the introduction of parol testimony “to annex incidents” to the grant, and show that these gas fixtures *had legally become* “*fixtures*,” intended by the owner “*ad integrandum domum*,” with a view to render the dwelling-house *complete* for the purposes

* Present, DALY, Ch. J., ROBINSON and LOEW, JJ.

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of its occupancy and full enjoyment as a residence (1 Greenl. Ev. § 294; 1 Wash. Real Prop. 17). In the consideration of the question, whether certain articles, which in their nature are mere chattels, have become part of the freehold, by mere attachment and ordinary use therewith, for the general purposes to which it is adapted and employed (*Lawton v. Salmon*, 1 H. Bl. 251), the mere *intention* of the owner, evidenced by according acts, is sufficient to so appropriate and convert personal chattels into *fixtures* annexed to the freehold, that they would pass by his deed to his grantee. This case (by the affirmative *extrinsic* evidence uncontradicted by plaintiff) conforms to the requirements, in this respect, accepted and adopted as law in the most recent decisions on the subject by the Court of Appeals, in *Potter v. Cromwell* (40 N. Y. 297). "First. Actual annexation to the realty or something appurtenant thereto. Second. Application to the use or purpose to which that part of the realty with which it is connected, is appropriated. Third. The *intention* of the party making the annexation, to make a permanent accession thereof to the freehold." It furnished evidence that the gas fixtures had been put in "to enhance the general value of the estate and not for its temporary enjoyment" (*Winslow v. Merch. Ins. Co.* 4 Met. 310), which being uncontradicted by the plaintiff, present as a witness on the trial, became conclusive on that point. I am of the opinion that the proof of plaintiff's statement tending to show the gas fixtures had been annexed by the owner for that purpose was admissible, and that fact being shown *affirmatively*, they strictly became annexed to the freehold, within the principles of *Hill v. Wentworth* (28 Verm. 425); cited and adopted in *Potter v. Cromwell* (*supra*), and also *Voorhees v. McGinnis* (48 N. Y. 278).

The attempt of the plaintiff to recover for these gas fixtures, after presenting them, in their complete condition, as an inducement for the defendant to purchase the property, was certainly inequitable, and it is satisfactory that a full answer at law exists to his unconscientious demand.

The judgment should be affirmed.

Judgment affirmed.

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PHILLIP C. HUBBELL v. JOHN SCHREYER AND OTHERS.

Where, under the mechanics' lien law of 1863, the owner admits that a certain amount is due by him under the contract, and that amount is insufficient to satisfy all the liens, so that the question of priority of liens becomes material, or the validity of any lien is questioned, the report of the referee, as the statute directs, is to be in a summary manner, as in claims to surplus moneys in mortgage cases, to enable the court to distribute the fund to the parties entitled to it; which report does not, when filed, like a report upon the issues, stand as the decision of the court, but eight days must elapse after the service of notice of the filing of it, that exceptions may be filed and served, which exceptions must be heard and passed upon at the special term, before the report is confirmed or becomes absolute.

But if the owner deny that there is anything due by him to the contractor, or interpose any defense, so that the question is the liability of the owner, or the existence of a fund in his hands to which a lien can attach; then an issue is created between the owner and the claimants, and if the trial of this issue is referred, the report of the referee, when filed, stands as the decision of the court, and is reviewable only by an appeal to the general term.

The foreclosure of a lien, under the mechanics' lien law is a matter of equitable jurisdiction, and the course of procedure is in accordance with the practice of courts of equity, except so far as it has been modified by statute.

The object of the law in requiring the notice of the lien to state the amount claimed, and *from whom*, is in order to distinguish the claim of a subcontractor, who has simply a lien on the building to the extent of the amount which may be due from the owner to the contractor, and the claim of one having a contract directly with the owner, who has not only a lien upon the building, but the right also to a personal judgment against the owner.

Where the claim was due to *three* persons jointly, and the notice stated that it was due to one of them only, *Held*, that the notice did not comply with the provision of the statute requiring that the notice shall state "*to whom* the amount claimed is due," and that, consequently, no lien was created by it.*

* The statute, in a previous section, says, that "no *variance* as to the persons named as contractor, owner, or debtor," in the lien, notice, &c., shall impair or affect the rights of the claimants; but stating in the notice that the claim is due by a person therein named, when the contract was made with and the claim is due by a person not referred to in the notice at all, is not a variance, but a defect of substance. A mistake in the name of the person who made the contract, as to call him Peter, when his name is Paul, may be a variance; but to state in the notice that the contract was made by a certain person, who is correctly named therein, when in fact it was made by another person, is a defect of substance.

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The lien given by the statute being a personal right, the right to create it cannot be assigned or transferred to another. Whether, where two of three joint contractors relinquish all their joint interest in the claim to their co-contractor, he can acquire a lien by stating in the notice filed that the claim is due to him, *Quare*. Where he filed such a notice, and his co-contractors, after the filing of it and the institution of proceedings to foreclose the lien, assigned all their joint interest to him; *Held*, that this would not cure the defect in the notice; that no lien can be created where anything is omitted, which, by the statute, is expressly required in the notice.

Where the claim is against the owner, it does not invalidate the notice that it states that another (in this case the contractor) is jointly liable with the owner. It is sufficient that it states that the amount is claimed from the owner upon a contract made with him, and that the joint responsibility of another is coupled with him is immaterial. It is a matter of defense for the person so joined, but not a defect of which the owner can take advantage.

The filing of the notice is the foundation of a proceeding in which a personal judgment may be rendered against the party who ordered or contracted for the work or for the materials, and it is his right that any decision or judgment that may be rendered in his favor upon the contract should be conclusive upon the parties to it.

Under the act of 1868 (which differs in this respect from the acts of 1851 and 1855), a claim against the contractor and a claim against the owner may be joined in the same notice, provided each claim is separately distinguished, and the court may enforce one as a lien upon the building to the extent of the payments due by the owner to the contractor, and as respects the other, not only enforce it as a lien upon the building, but render a personal judgment against the owner for the amount of it. But a claim stated in the notice to be against the contractor must, in the foreclosure of the lien, be shown to be a claim of that description, and it will not suffice to show that it is a claim founded upon a contract with the owner, and upon a claim stated in the notice to be against the contractor, a personal judgment cannot be rendered against the owner.

The lien attaches only to so much of the materials as were furnished within three months prior to the filing of the notice, even though all the materials were furnished under one contract, and the notice was filed within three months from the completion of the contract.

A personal judgment cannot be given for materials furnished more than three months before the filing of the notice of lien, unless all the materials were furnished under one contract, in which case it seems that the court having acquired jurisdiction in respect to the contract, by the action to foreclose a lien acquired

The statute afterwards, in sec. 6, distinguishes what is matter of substance in the notice; and it is not a variance, but a defect of substance, to say that the contract for work or materials was made by the one who contracted with the owner, when in fact it was made with the owner himself.

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under it, it can give the relief which the statute contemplates, in the rendition of a personal judgment, under the rule that where a court of equity has gained jurisdiction of a cause for one purpose, it may determine the whole matter in controversy, to prevent further needless litigation or multiplicity of suits, and can give further relief without the assistance of a jury.

But where each item delivered constitutes an independent contract, as to which the statute of limitations would run from the day of its delivery, this cannot be done.

APPEAL by defendant Schreyer from a judgment entered on the report of a referee in a proceeding to foreclose a mechanic's lien.

The facts are stated in the opinion.

David McAdam, for appellant.

E. P. Rice, for respondent Muldoon.

G. R. Dutton, for respondent Hubbell.

BY THE COURT.*—DALY, CH. J.—Before passing upon the *exceptions* to the referee's report, it will be necessary to consider a *general objection* as to the *manner* in which the report comes before us an appellate tribunal.

It is claimed that the reference in actions brought for the enforcement of mechanic liens is, within the meaning of Rule 39 of the Supreme Court, a reference, other than for the trial of the issues of the action, inasmuch as the amendatory lien law of 1863 (Laws of 1863, p. 862, ch. 500, § 7), provides that the referee is to report in a summary manner, as in case of claims to surplus moneys in mortgage cases. It is apparent that the person who drew the amendatory lien law of 1863, or who framed this particular provision, had no practical acquaintance with the nature of *reference of claims to the surplus moneys in mortgage cases* as established by the practice of the former Court of Chancery and regulated by the existing rules of the Supreme Court, or he would have known that a reference of "*the whole matter*" in a mechanic's lien case, so far as the right or liability of the owner may be in question, is an inquiry

* Present, DALY, Ch. J., and ROBINSON, J.

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of a very different nature from that which arises in claims to a surplus fund in a mortgage case, as the former, when it arises, involves the *trial of an issue*, and the latter does not. A mortgage is foreclosed either by action or by advertisement, of which subsequent incumbrancers, such as mortgagees, judgment creditors, or those having the equity of redemption, are apprised either by being made parties to the foreclosure suit, or by being served with notice, if the foreclosure is by advertisement. If the subsequent incumbrancers have no right or interest in the premises, adverse to that of the mortgagees, they cannot, although parties, litigate in the foreclosure suit, for they are not permitted to contest their respective claims to the surplus, as between themselves, until it is ascertained that there will be a surplus (*Union Insurance Co. v. Van Rensselaer*, 4 Paige, 85; *Farmers' Loan &c. Co. v. Seymour*, 9 Id. 544).

Formerly the practice was otherwise, and the rights of the subsequent incumbrancers, with respect to each other were ascertained and reported upon by the master, previous to decree of sale (*Renwick v. Macomb*, Hopk. Rep. 277); but as the effect of this was to delay the mortgagee in the foreclosure of his mortgage, the practice was changed by a rule of the Court of Chancery (Rules of 1830, as amended in 1840), since which the present practice has prevailed. A reference is ordered to ascertain the amount due under the mortgage to the complainant, and to prior incumbrancers if there should be any among the defendants. Upon the coming in of this report, the decree of sale is made, and after the sheriff has sold, he applies the proceeds to the payment of the claim of the complainants and any prior incumbrancer's claim, and if after the payment of claims and all costs and charges, there is any surplus, it is brought by the sheriff into court, for the benefit of whoever may be entitled to it, and deposited by him with the chamberlain,—in this county, and in other counties with the county treasurer,—subject to the order of the court. After the filing of the report of the sale, any one having a claim to the surplus or to any portion of it, may file a notice of his claim, and upon this a reference is ordered to ascertain the validity of the claim, or generally who are entitled to the surplus.

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If, however, the validity of the mortgage, or the amount due under it, is contested by the mortgagor, or by a subsequent incumbrancer, then an issue is created upon the pleadings, and the cause is placed upon the calendar and brought on for trial in the same way as other equity causes, which are tried by the court, unless the parties consent to a reference, or the issue is one referable under the 271st section of the Code ; and where the whole issue thus raised by the pleadings is referred, the report of the referee, by the 272d section stands as the decision of the court.

I have detailed the course of procedure in mortgage cases, as it will assist in the interpretation of the meaning of the amendatory lien law of 1863, not only from the reference then made to this particular procedure, but because there is a *close analogy between the foreclosure of a mortgage and the foreclosure of a lien*. The 7th section of this amendatory lien law of 1863, has provided that the court may take the proofs and determine the equities of the parties, the amount due to each, and by whom to be paid, or it may order any question to be tried by a jury, or it may “*refer the whole matter to a referee to examine and pass upon the rights of the respective parties, and report upon the same in a summary manner, as in case of claim to surplus moneys in mortgage cases.*” Where the owner admits that a certain amount is due under the contract which he made for the erection of the building, and that amount is insufficient to satisfy the claims of all the parties, so that the question of priority of liens becomes material, and which may also involve questions as to the validity of any of the liens in the event of any lien being disputed by the contractor or by subsequent lienors, then “the whole matter,” in the language of the act, if referred, may be reported upon “in a summary manner, as in case of claims to surplus moneys in mortgage cases,” for the proceeding is of the same nature, there being a fund, as in surplus moneys in mortgage cases, to which there may be many claimants, and the general inquiry being, who are entitled to it, or in what way it is to be distributed, apportioned, and to whom? All the claimants are actors; that is, each appears as the representative of his own

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interest, asserting his own claim, but not necessarily contesting the claims of others.

In *such a proceeding* there are no formal pleadings, and consequently there are no issues; for an issue, as defined by Blackstone, is, "when, in the *course of pleading*, the parties in a cause come to a point which is affirmed on one side and denied on the other. They are then said to be at issue; all their debates being at last contracted into a single point, which must be determined either in favor of the plaintiff or the defendant (3 Bl. Com. 313); or, as it has been more accurately defined by Chitty, it is "a single, certain and material point arising out of the pleadings of the plaintiff and defendant" (1 Chit. on Pleading, page 690, 6th Am. ed.), and is not necessarily confined to a single point, for there may be in the action several issues arising upon the same pleadings. *Nothing of this character arises upon a reference of the description under consideration.* It is simply an inquiry, summary in its nature, to enable the court to distribute the fund to the parties entitled to it, in which the report of the referee does not, when it is filed, like the report of the trial of the issues in the action, stand as the decision of the court, for, under the 39th rule of the Supreme Court, eight days must elapse after service of the notice of the filing of it, that exceptions may be filed and served; which exception, if taken, must be heard and passed upon by a judge at the special term before the report is confirmed and becomes absolute.

The proceeding to foreclose a mechanic's lien is, in the statute of 1863, denominated a "suit" and an "action" (sections 6-10), and calling it by the name which the statute gives it, there may be in the action, in the language of the 39th rule, a "trial of the issues." If the owner puts in an answer denying that there was anything due by him under the contract when the lien was filed, an issue is created which supersedes and suspends every other inquiry; for if that is found to be the fact, it puts an end to all further proceeding, and the action must be dismissed.

The foreclosure of a lien, whether it arises under the mechanic's lien law or otherwise, is a matter of equitable juris-

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diction. It is an equitable, as contradistinguished from a legal remedy, and the course of procedure, whether it relates to the pleadings, the mode of trial, the evidence, or the remedy, is in accordance with the courts of equity, except so far as it has been modified in this State by statute. Issues of fact or of law may arise in courts of equity upon the pleadings, as they do in courts of law (Gresley's Equity Evidence); as, for instance, where the defendant answers an interrogatory in the bill, and the answer is replied to, the matter of the interrogatory is deemed to be at issue (Story's Equity Pleading, sections 36, 885, 886), the practice of courts of equity being in *most cases* to order the issue, whether of fact or of law, to be tried or decided in a court of law; but in this State where legal and equitable and legal jurisdiction is exercised by the same tribunal, such issues, when they arise in matter of equitable cognizance, are tried by the court as an issue in the action (*Draper v. Day*, 11 How. Pr. 439; *Elmore v. Thomas*, 7 Abb. Pr. 70; *Schaettler v. Gardner*, ante, p. 56). In the present case, issues superseding every other inquiry, were created by the owner's answer. He denied that the claimant, Hubbell, or the lienor, Muldoon, did or could acquire any lien upon the premises; that all the money due by him, the owner, to the contractor had been paid in good faith prior to the filing of either lien; that the contractor had paid whatever claim either Hubbell or Muldoon had; to which Schreyer, the owner, further added a general denial of every allegation made by either claimant.

In the notice of lien filed by Hubbell, he sets forth that he has a claim of \$1,444 48 against the owner, Schreyer, and the contractor, Holt, for building materials furnished by him in pursuance of a verbal agreement had with Schreyer, the owner, and Holt the contractor; and in the notice filed by Muldoon he states that he has a claim against Schreyer, the owner, of \$883, and against Holt, the contractor, of \$1,349, for materials furnished in pursuance of an agreement, written and by parol, between Holt, the contractor, and Schreyer, the owner, and himself, Muldoon.

Hubbell claims upon a contract made by him with Schreyer the owner, and Holt, the contractor; but Muldoon claims to

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have a lien for one amount against the owner, and for a different and larger amount against the contractor; and it is by no means clear upon his statement, whether he claims as a subcontractor with Holt, under the contract between Schreyer and Holt, or upon a contract made by him with Schreyer and Holt, upon which they were responsible for different amounts.

But, as the owner, Schreyer, denies each and every allegation in the complaint of Hubbell and in the answer of Muldoon, and as the contractor, Holt, put in no answer, an issue was created, by which Hubbell affirmed and Schreyer denied that the materials were furnished upon a contract made by Hubbell with Schreyer and Holt; which issue, if found in Schreyer's favor, put an end to all claim on the part of Hubbell against Schreyer, and to any lien upon the premises of which Schreyer was the owner. For Hubbell did not claim in his notice to have a lien upon the premises for materials furnished in pursuance of the contract made between Schreyer and Holt, but upon a contract made by himself with Schreyer and Holt (*Hauptman v. Halsey*, 1 E. D. Smith, 668; Nott's N. Y. Lien Law, pp. 10, 11). And as respects Muldoon, whether his claim be regarded as founded upon an alleged contract made by him with Schreyer and Holt, or upon the furnishing of materials by him in pursuance of the contract made by Schreyer with Holt, or in part upon both, an issue was created by Schreyer's answer, which went to the whole of Muldoon's claim, upon whatever ground it rested, inasmuch as Schreyer averred that he had paid Holt all that was due to him under his contract before Muldoon's lien was filed; and he objected in his answer to the regularity of the notices of lien filed in each case; and in addition denied each and every allegation in the answer of Hubbell and Muldoon.

There were, therefore, *two issues* to be tried in respect to the claimant Hubbell, and *three* in the case of Muldoon, the determination of which in the owner's favor, would put an end to the action; for although Holt had suffered it to go by default, a personal judgment could not be obtained against him; for to authorize such a judgment, it must be proved, or conceded, that a lien was obtained upon the premises for the work

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or materials for the amount or value of which a personal judgment is asked against the contractor (*Donnelly v. Libby*, 1 Sweeny, 259; *Barton v. Herman*, 3 Daly, 323, 324, and the cases there cited).

As the pleadings stood, there were several issues to be tried: 1st. Whether the notices filed by either Schreyer or Muldoon were notices under which any lien could be acquired; 2d. The personal liability of Schreyer, assuming the notices to be sufficient under the statute; 3d. Whether anything was due by him upon his contract with Holt, to which the lien of Muldoon could attach. It is not essential in this case to determine whether the court, under the act of 1863, could order these issues to be tried by a referee, as the reference in this case was with the consent of all the parties; although if the point were material, I should not hesitate to hold that the authority given by the act to "refer the whole matter to a referee," is sufficient to authorize such a reference; that the referee's report would have to be a finding upon the issues, and being a report upon the whole issue, would, under the 272d section of the code, stand as the decision of the court; and that a report in a summary manner, as in case of claims to surplus moneys, is and can be made only when the litigation is *between the claimants*. The statutes declare that upon the reference "every party shall be at liberty to take proof for or against any claim or lien, and such judgment or decree shall be made thereon as to the rights and equities of the several parties among themselves, and as against any owner, as may be just." This provision I regard as applying to the reference generally, whether the contract is exclusively *between the claimants themselves* or between the *claimants and the owner*. I do not interpret it as providing, in all cases in which the whole matter is to be referred, that the report is to be as in case of claim to surplus moneys in mortgage cases. Such may have been the expectation of the person who framed this provision; as the object aimed at in many of the amendments of the lien law within the past twenty years, has been to do what is impossible; to make a proceeding exceedingly simple which is in its nature complicated; for to ascertain and adequately adjust the rights of all the parties—

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the owner, the contractor, and the respective claimants,—where not only a lien upon real estate is to be enforced, but a personal judgment may be rendered between the proper parties for the enforcement of a contract, is a proceeding of so complicated a nature, that it can be carried out only by the method, rules and course of procedure, which *courts of equity* have devised for the due and proper adjustment of the rights of all parties in such cases. This statute, the last general amendment of the lien law, has now been in existence for more than nine years, and so far as this court is concerned, which is made by statute the appellate court for the review of these cases when brought in the Marine or District Courts, and which has had also to adjudicate during that time upon a large number of such cases brought here in the first instance, the practice has been, where the contest is between the owner and the contractor, or subcontractor claiming to have a lien upon payments to be made to the contractor, and where the only question is the *liability of the owner or the existence of a fund in his hand* to which the lien will attach, to regard the matter as the trial of an issue between the *owner and the claimants*; whether it is passed upon by the court, tried by a jury, or referred; in the latter of which cases the report of the referee, like the trial by a jury, stands as the decision of the court, to be reviewed only on appeal to the general term, brought within ten days after the entry of the judgment upon the referee's report. And this practice having been so long acquiesced in and followed, and being, as it is, a mere matter of practice, it ought not now to be disturbed, even if there should be doubt as to the construction of the statute. The reference being with the consent of all parties, and the referee's finding being upon the issues in this action, judgment was properly entered upon the filing of the report, and the appeal from the judgment to the general term is correct, and upon the exceptions filed brings under review the referee's findings upon the questions of fact and law.

Hubbell's notice of lien was of a claim against Schreyer as owner, and Holt as contractor, for material furnished in pursuance of a verbal agreement made, in the language of the notice, with the contractor and the owner. This is not, as the

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owner claims, a statement on the agreement, one made by Hubbell with the contractor, and the other with the owner for the payment of the materials. If such were the construction of the notice, the lien could not be sustained, as the agreement of the owner would in that case, being necessarily collateral and as a promise, not in writing, to answer for the debt of another, it would be void by the statute of frauds. The true construction of the notice is, that it is a statement of a joint agreement on the part of Schreyer and Holt with Hubbell to pay him for the materials furnished. And regarding it in that light, there is nothing in the evidence to show that any such joint obligation was entered into by them. Holt contracted with Schreyer to furnish the materials, but it does not appear from the finding of the referee, or from anything that I have been able to discover in the evidence, that Holt contracted with Hubbell to supply them on his (Holt's) individual responsibility.

On the contrary, it appeared that Hubbell had ceased to furnish materials for the building, giving as his reason that Holt was a stranger to him; that he was not a responsible man; that he had stated or said that he, Hubbell, had been told that Holt had no means of his own, and was not to be trusted. The referee has found that the materials were furnished upon the credit of Schreyer as well as of Holt, but he negatives any such conclusion in respect to Holt. There is evidence that they were supplied upon the credit of Schreyer; that is, upon his expressed promise to pay for them, made after Schreyer was informed by Hubbell, that he would not send goods to the building any more unless Holt paid for them. The materials appeared to have been ordered by Holt in the presence of Schreyer, after Schreyer had declared that he would pay for them, and the only conclusion warranted by the evidence is that they were furnished upon the exclusive credit of Schreyer, who said expressly before they were ordered, that if Hubbell was afraid of Holt, he (Schreyer) would see every cent's worth of materials sent to his buildings would be paid for; *that he would pay for them.*

They were entered in Hubbell's ledger, "Thomas Holt for

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John Schreyer," which it would appear, from Hubbell's evidence, was done to distinguish the mason work from the plastering work, Holt's name being entered for the one and Fridenburg for the other; in the same manner, "Orin Fridenburg for John Schreyer." It further appears that after the materials were furnished, Hubbell asked Holt for money, and gave him his (Hubbell's) bill to give to Schreyer. That there was no joint liability is very clear. There was no promise on the part of Holt, and nothing on Hubbell's part to show that the goods were furnished on the joint responsibility of Holt and Schreyer; or that Hubbell was first to look for payment to Holt, and upon his failure to pay, that Schreyer was to be responsible, which is the test whether the promise is collateral or not (*Brown v. Weber*, 38 N. Y. 189-190).

The only interpretation to be put upon the evidence is, that it was an original promise on the part of Schreyer, that if the materials wanted were furnished, he would pay for them.

The fact that the notice of lien filed set forth a joint contract, and that no joint contract was proved, but only an individual undertaking on the part of Schreyer, is not a matter of which Schreyer ought to be allowed to avail himself. It was a matter of defense for Holt, but he made no complaint, having suffered judgment to go against him by default. The lien law requires that the notice of lien filed shall state the amount claimed, and *from whom* (Laws of 1863, p. 862, ch. 500, § 6). This is essential to distinguish the claim of a subcontractor, who has simply a lien upon the building to the extent of the amount which may be due from the owner to the contractor, and the claim of the contractor directly against the owner; who has not only a lien upon the building, but the right also to a personal judgment against the owner. This distinction is apparent in the present notice. It is not the claim of a subcontractor, but of a contractor with the owner. The amount is claimed from Schreyer as owner; and it does not, in my judgment, invalidate the notice that the amount is claimed also from Holt, the contractor. It is sufficient, for the purposes of the statute, that it is claimed from Schreyer; and that the

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joint responsibility of another is coupled with him in the notice, is, in my judgment, immaterial. A substantial compliance with the statute is all that is requisite in the notice creating the lien (*Beals v. The Congrégation B'nai Jeshurun*, 1 E. D. Smith, 654); and where it appears by the notice that it is a claim for a certain amount against the owner, upon a contract made with him, that is, I think, sufficient to create a lien upon the building by the filing of the notice, to the extent of the claim made against the owner, and everything else in the notice may be rejected as surplusage. *The chief object of the notice is to apprise the owner that his property is sought to be charged*, and to protect others, such as purchasers, or mortgagees, by apprising them of the *alleged* claim (*Beals v. Congrégation, &c. supra*). And this was substantially complied with in the present case, so far as respects the imposition of a lien upon the building, to the extent of the amount claimed against Schreyer. It did not and could not create any lien upon the building by virtue of a claim also against Holt, for he was not the owner, and it did not purport to be a claim upon funds in the hands of the owner to which the claimant was equitably entitled by statute, under a contract made by him with Holt, for materials which were in conformity with the terms of a contract made by Holt with the owner. This portion of the notice, therefore, may be rejected without affecting the sufficiency of it as a notice of a claim against Schreyer. The whole course of legislation in respect to liens of this meritorious character has been to facilitate, as far as possible, the means by which the mechanic or material-man may secure himself, by filing notice of his lien; and the court, if it is at all possible to do so, should give full effect to such a notice, declaring it invalid only where there is a plain and absolute want of one of the requirements which the statute has made essential to the creation of the lien.

The materials were furnished between the 25th of May and the 22d of December, 1870; the notice of lien was filed on the 23d December following, the day after the delivery of the last item; and the objection is taken that the lien, by the express terms of the statute, attaches only to so much of the materials

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as were furnished three months previous to the filing of the notice, which would reduce Hubbell's lien to about \$174.

It was held by the Court of Appeals, in *Spencer v. Barnett*, 35 N. Y. Rep. 94, that under the Kings county act, the lien did not attach to materials furnished more than sixty days before the filing of the notice, although furnished under the *same contract* as the materials which were delivered within the sixty days.

There was a difference between the Kings county act, under which decision was made, and the act applicable to this county; as, under the former act, the material-man had double the time given to him for the filing of his lien, that was given to the mechanic, which has not been the case in any of the acts applicable to this city, nor is it now under the present Kings county act; this distinction in Kings county between the mechanic and the material-man having been repealed in 1862 (Laws of 1862, p. 949, § 3). My colleague, Judge Robinson, before whom and myself the argument upon this appeal was heard, is of opinion that this distinction between the provisions in the two acts can make no difference in the application of the decision of the Court of Appeals; that that decision, as a construction of the lien law, is as applicable to the law enacted for this county as it was to the Kings county act; and I confess that I am not prepared to hold that the difference between the two acts is such as to warrant us in saying that that decision is to be limited to the Kings county act as it existed prior to 1862, and does not apply to the law as enacted for this county; and, *but for this decision*, I should certainly have taken the same view as Judge Nott, in his Treatise, page 89—that the lien law did not contemplate the amount claimed being from time to time split up by separate liens, nor a repetition of a lien for parts of the same thing; and in the case of an *entire contract*, that the three months begins to run from the completion of the work, or the delivery of the last item of the materials contracted for.

Assuming, as I think we must do, that the decision of the Court of Appeals is to be received and followed as an interpretation of our own act, then the finding of the referee, that

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Hubbell was entitled to a lien for his whole claim upon the building was erroneous, and the report must be modified so as to limit the lien to the items delivered after the 23d of September, 1870, my conclusion being that the notice was properly filed, and that the materials were furnished upon a contract made by Hubbell with Schreyer.

I now pass to the claim of Muldoon. He filed the notice of his lien on the 12th of January, 1871. It set forth two claims; one against Holt for \$1,349, and one against Schreyer for \$883. They were both for brown stone furnished for, cut, and set in the building.

The stone in the claim against Holt was alleged to have been furnished, cut and set in pursuance of a contract between Holt and Schreyer—that is, it was a claim as subcontractor,—and the other was a claim for extra work and materials upon a contract made by Muldoon with Schreyer, for which Schreyer would be personally liable.

The lien, so far as respects the first claim of \$1,349, is objected to on the ground that Holt's contract was made with Muldoon, Kenney and Doonan, and in the notice filed the claim is stated to be simply the claim of Muldoon. The act of 1863 prescribes that the notice shall state *to whom* the amount claimed is due, and when the notice of lien was filed, the amount was due, not to Muldoon individually, but to the three partners, Muldoon, Kenney and Doonan.

This being an express statutory provision, it cannot be dispensed with. The lien is created by the filing of the notice, and everything which the statute requires to be stated in it is an essential prerequisite to the creation of the lien, and if anything required by the statute is omitted, nothing is accomplished by the filing of the notice (*Beals v. Congregation B'nai Jeshurun*, 1 E. D. Smith, 654; Nott's Treatise on Mechanic's Lien Laws, pp. 10, 11, 13).

If the claim is due to three persons jointly, the notice should state that the amount claimed is due to them, and stating that it is due to one of them only is not a compliance with the statute. If that were permitted, each of them might file a separate notice in the same way, and the anomaly would be presented

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of three separate liens for the same claim. The parties who made the contract to perform the work and labor, or to furnish the materials, must be stated, because the filing of the notice is the foundation of a proceeding in which a personal judgment may be rendered against the party who ordered or contracted for the work or for the materials, and it is his right that any decision or judgment that may be rendered in his favor upon the contract, should be conclusive upon the parties to it; which would not be the case if the notice is filed, and the proceedings under it are instituted on behalf only of one of the joint contractors. In this case, the contract of Holt with Muldoon, Kenney and Doonan, to furnish and put up the brown stone, was in writing, so as to leave no question as to the fact; whilst in the notice filed, the agreement is set forth as made with Francis Muldoon, and the notice is to the effect that he has, and claims a lien upon the building. The only construction that can be put upon such a notice, is, that he *alone* made the agreement with Holt, and that he individually had a right to claim a lien for the performance of the agreement. The lien under the statute is a personal right given to those who do the work or furnish the materials (*Rollin v. Cross*, 45 N. Y. 771); and where there are several, no one has the right to create the lien exclusively for himself. It is given by the statute to any person or persons who shall, as contractor, laborer, workman, merchant, or trader, perform any labor or furnish any materials (Laws of 1863, p. 861, § 1); and when the statute declares that the notice shall state to whom the amount claimed is due, it plainly means, if there be more than one, the "persons" to whom it is due, and to whom, by the first section above quoted, the right to a lien is given.

At the hearing before the referee, an assignment in writing of the claim by Doonan and Kenney to Muldoon, was given in evidence by Muldoon. The instrument was dated the 16th of September, 1870, which would be more than three months before Muldoon filed his notice, the notice having been filed on the 12th of January, 1871. The lien being a personal right, the right to create it cannot be transferred or assigned to another (*Rollin v. Cross*, 45 N. Y. R. 771; *Daubigney v. Du-*

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val, 5 Tenn. 604; *Caldwell v. Launnier*, 10 Wis. 332; *Parsons v. Tincker*, 36 Me. 384). It may be that an assignment like this, in which two of three joint contractors relinquish and give up to the co-contractor all their joint interest in the claim, would entitle him to acquire a lien, by filing his notice in the manner in which Muldoon did. But that question cannot arise in this case, for it is proved by the evidence of Muldoon himself, that although the assignment bears date the 16th of September, 1870, it was not executed, in fact, until after the notice was filed, and after the proceedings were instituted to foreclose, that is, some time in the early part of the year 1871. He was examined as a witness on the 17th of August, 1871, before the referee, and testified that the assignment had been executed about a month before the day of his examination. He also testified that his partners ran away on the 15th of September, 1870, and the date of the instrument is the 16th, the day afterwards; so that at the time when Muldoon filed his notice, Doonan and Kenney were jointly interested in the claim, which was *due to the three, and not, as appeared by the notice, to him alone.* Doonan and Kenney, as he testified, ran away with the money, and, under the circumstances, he probably erroneously regarded himself as exclusively entitled to the claim.

The assignment after the filing of the notice, and the institution of proceedings to foreclose the lien, could not cure the defect in the notice. If the statute had not provided that the notice should state to whom the amount was due (as in the act of 1851, which had no such provision), we might get over the difficulty by leaving the owner or contractor to plead or set up the non-joinder in the action brought to foreclose the lien. But the act of 1863 has made this statement in the notice essential, and no lien can be created where anything is omitted, which the statute has expressly required.

When the evidence on the part of Muldoon was closed, a motion was made to dismiss his claim, on the ground that the work was done by the firm; that no assignment of the claim to him by his copartners was made prior to the filing of the

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notice to create the lien, and that the notice should have been filed by, or on behalf of the *firm*.

The objection having been taken, it was error on the part of the referee to disregard it. This applied to the claim stated in the notice to be against Holt, \$1,349, for which, the referee held, a good and valid lien was created by the filing of the notice.

Though the notice of lien distinguished between the claim which Muldoon stated in the notice he had as a subcontractor against Holt, \$1,349, and the claim he had separately against Schreyer, \$883, the referee made no such distinction; but putting both claims together, which amounted to the sum of \$2,232, he found that the whole sum was due from Schreyer to Muldoon, with interest, and reported that Muldoon was entitled to judgment against Schreyer for that amount, with costs.

Judge Nott, in his carefully considered treatise, was of the opinion that under the acts of 1851 and 1855 distinct claims against the owner and the contractor could not be joined in the same lien; that the statutes then existing did not contemplate and would not warrant such a course. The act of 1863 is in this respect, however, more comprehensive, and as it gives the court the power to determine the rights and equities of all parties, and the amounts due to each, I see no objection to including a claim against the owner and a claim against the contractor in the same notice, where, as in this case, each claim is separately distinguished; for the court may enforce one as a lien upon the building to the *extent* of the *payments* due by the owner to the contractor, and as respects the other, not only enforce it as a lien upon the building, but render a personal judgment against the owner for the amount of it.

The first section gives a lien to the person designated, for labor performed or materials furnished in pursuance of the terms of a contract with or employment by the owner, or in conformity with the terms of such a contract (which embraces the case of a subcontractor) "*or by or in accordance with the direction of the owner or his agent.*" This is very comprehensive and includes a subcontractor's contract, if in conformity with the contract for the building, made with the

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owner, and also a contract made directly with the owner; and I see no objection to including both in the notice if they are separately distinguished. But a claim stated in the notice to be against the contractor, must in the foreclosure of the lien be shown to be a claim of that description, and it will not suffice to show that it is a claim founded upon a contract made with the owner, because the statute requires that the notice by which the lien is to be created must state *by whom* the amount claimed is due, and the notice having stated it to be due by the contractor, when in fact it was due by the owner, *the notice is shown to have been defective, inasmuch as a material and essential statement in it turns out to be untrue.*

The referee, therefore, erred upon two grounds: 1st, by holding that upon a claim stated in the notice to be against the contractor, a personal judgment could be rendered against the owner; and 2d, that Muldoon acquired a valid lien upon a claim due to him jointly with two others by filing a notice stating that the claim was due to him.

Independent of this joint contract, Muldoon claimed to recover \$967 for extra work, upon which claim the referee allowed him the amount stated in his notice, \$883. It did not appear that Doonan or Kenney had anything to do with this extra work, or that any contract, express or implied, was made for it with Holt. It would seem that after Muldoon's partners left, Muldoon finished the work, and that he received a *plan* from Schreyer out of which this extra work arose, the new plan being different from the previous one. When this plan was presented by Schreyer to Muldoon, he objected to it without being paid extra for work done according to it. Schreyer insisted that he should do it, as that was to be the finish when the building was completed, and after some discussion, Schreyer said he was willing to and would pay for anything extra on the building; upon which Muldoon replied that he would go on with it, and he finished the work according to the new plan. This conversation with Schreyer occurred before Muldoon commenced on the new plan, or did any of the extra work, which extra work he charged upon his books to Schreyer.

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It was, under these circumstances, clearly a contract between Muldoon and Schreyer, and the referee was right in holding that Schreyer was individually responsible for the payment of this \$883.

The evidence warranted a decree for the enforcement of a lien upon the building for the materials which had been furnished by Hubbell *three months prior to the filing of his lien*. As the lien never attached to the materials which were furnished before that time, I do not think a personal judgment could be rendered in this action for the enforcement of a lien for the materials anteriorly furnished. If they had been furnished under the same contract as the materials subsequently supplied, and to which the lien attached, there might be some ground for arguing that, having acquired jurisdiction in respect to the *contract* by the action to foreclose, a lien was acquired under the contract, but not for all the materials furnished under it; we might give the relief which the statute contemplates, in the rendition of a personal judgment, under the familiar rule that where a court of equity has gained jurisdiction of a cause for one purpose, the court may determine the whole matter in controversy, to prevent further needless litigation or multiplicity of suits, *if it can give the further relief without the assistance of a jury* (*Armstrong v. Gilchrist*, 2 Johns. Cas. 430, 431; *Rathbone v. Warren*, 10 Johns. 596; *King v. Baldwin*, 17 Id. 386; *Russell v. Clark*, 7 Cranch, 89; *Parker v. Dee*, 2 Ch. C. 200, 201; Story's Eq. Jur. § 72).

But Judge Robinson has pointed out that the order given by Schreyer to Hubbell for the furnishing of materials, had not the characteristics of an *entire contract*, each item, in his opinion, constituting an independent contract, as to which the statute of limitations would run from the day of the delivery of the items, and under that view, I do not think that we have jurisdiction, under the act of 1863, to render a personal judgment upon contracts performed three months before the notice of lien was filed, and which, consequently, it did not embrace. The evidence warranted a judgment against Schreyer for the extra work done by Muldoon. The report will therefore have to be reversed as to Hubbell, except for the materials furnished

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within the three months, and affirmed as to the extent of these materials.

The referee's finding upon Muldoon's claim will have to be reversed, unless Muldoon consents to reduce the judgment entered in his favor to \$883, and interest, in which event it will be affirmed for that amount.

There were several objections taken by Schreyer to the admission and exclusion of evidence. These exceptions, or very many of them, would scarcely be available in an action at law, and in an equitable proceeding or action, errors of this description are not regarded, if, taking the whole evidence together, the court is satisfied that no injustice has been done by the errors complained of (*Clark v. Brooks*, 2 Daly, 164, 165); and such, we are satisfied, is the case here.

ROBINSON, J.—I concur fully in all the conclusions to which the Chief Justice has arrived in his opinion, and without entertaining doubt on the question suggested by him, that the lien of the plaintiff Hubbell is limited to the items of his account supplied within three months prior to the filing of his notice of lien (Dec. 23, 1870), amounting to \$173 47. The subsisting mechanics' lien law, applicable to this city (Laws of 1863, chap. 500), by its 6th section, only authorized the filing of a notice and creation of a lien "within three months after the work is done, or materials furnished." Had all the materials of Hubbell's claim been furnished under an *entire contract*, for certain materials, or all such as were required by their plans and specifications for the erection of the building, it would probably have *deferred* the plaintiff's compensation therefor, until his contract was completed, and have attached the right of lien to articles that he had supplied on such contract, more than three months prior to the filing of the notice of lien; but I find nothing in the evidence warranting the conclusion that Hubbell furnished the materials for which his claim is made, upon an account running for seven months, upon any such *entire agreement*. Prior to May 23d, he had been selling materials to Holt, the contractor, and being dissatisfied by reason of the difficulty in obtaining payment, re-

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fused to sell him any more, and so stated to Schreyer, the owner, who thereupon, as the testimony warrants, and as was the finding of the referee, agreed with plaintiff "to pay for such material as should *thereafter* be furnished by plaintiff in and about the erection of the buildings." There is no suggestion, however, in the testimony, of any agreement, express or implied, between plaintiff and the defendant Schreyer, that the former should furnish any specific kind, quality, or quantity of building materials, or at any specific prices, or on any credit which prevented Hubbell from demanding immediate payment for the materials he furnished, or which prevented either party from declining to deal with the other in reference to the matter. It was but the opening of a running account which either might discontinue at pleasure, and possessed none of the characteristics of an *entire account* for all materials necessary to the completion of the building, according to the plans and specifications. In the absence of any agreement of this precise character, each item of the account constituted the subject of an independent contract, against which the statute of limitations would run from the day of delivery of each article ordered and delivered (Ang. on Lim. § 148). The rule of law against the splitting up of demands, growing out of matters of account accruing from time to time on credits as applied for, into separate suits, is one to prevent the oppression of the debtor by his being subject to a needless multiplicity of suits (*Guernsey v. Carver*, 8 Wend. 492; *Colvin v. Corwin*, 15 Id. 557, as explained in *Secor v. Sturgis*, 16 N. Y. 548). It in no way segregates the items into an entire cause of action so as to debar the operation of the statute of limitations against the earlier items against which the prescription ran.

The mechanic's lien law, being in derogation of common-law rights, must be *strictly construed, as to all essentials necessary to the creation of the lien*. The operation of the 6th section, allowing the filing of the lien "within three months after the work is done or the materials furnished," is not, as in ordinary statutes of limitation, the imposition of forfeiture of the remedy or right of recovery, by cutting up the items of account, against which the prescription runs (*Kimball v. Brown*, 7 Wend.

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322; *Palmer v. The Mayor, &c. of N. Y.* 2 Sandf. 322, and cases cited), but is permissive, and affords a right through compliance with a condition precedent by which the lien may be acquired. While regarding the provision as only affording the remedy for work done or materials furnished within three months prior to the filing of the notice of lien, I can perceive no difficulty in the workman or material-man, whose claim rests in a current account filing successive notices of lien, as each successive period of three months is about elapsing, for the claims that have accrued during those times. Even this would be in no respect a splitting up of a claim on a current account, nor obnoxious to any recognized principle condemning such a proceeding, but would be merely insuring the collateral security for the current credits (as the act assumes to provide in § 3), by successive liens afforded either to contractor, subcontractor, workman, or material-man (according to their respective rights), or to either, for current or separate claims; the *liens* as to which may be successive, and become the subject of adjustment in the action contemplated by the act for foreclosure and adjudication as to the rights of all the parties.

While such a construction requires a prompt assertion of claim by way of lien, it also protects the owner and others interested in the property from stale claims and latent liens. Besides, the decision of the Court of Appeals in *Spencer v. Barnett*, 35 N. Y. 94, in my opinion is controlling upon the point. Except in the difference of time fixed by the Kings county act, then under review, requiring the notice of lien to be filed within *sixty* days after the materials are furnished, I can discover nothing in principle to distinguish from this.

The limitation of Hubbell's lien to articles furnished, as per his account, within three months of the filing of his notice of lien, to wit, after September 23d, 1870, is upon principle and authority.

Judgment as to Muldoon reversed, unless he consent to reduce it to \$883 and interest.

Judgment as to Hubbell reduced to \$173 47 and interest.

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HENRY S. FEARING *et al.* v. ROBERT IRWIN *et al.*

Where a deed grants lands bounded by or running along *the side of* a public highway, it does not convey the right of the grantor in the land to the center of the street, and, when the street is closed, the fee of the land to the center of the street does not pass to the owner of the abutting land, who claims under such a deed.

This rule applies to streets in the city of New York, closed under the act of 1867, (2 Laws of 1867, p. 1748, ch. 697), which declares (§ 3) that on any street being closed in pursuance thereof, the abutting owners shall be seized in fee simple absolute to such street.

Under the act of 1867 (2 Laws of 1867, p. 1748, ch. 697), providing for altering the map or plan of certain portions of the city of New York; when the commissioners of Central Park have made and filed the maps provided for in §§ 2 and 3 of the act, a street which does not appear on the map is closed without any further proceeding.

The estimate of loss and award of damage to the adjoining owners, is not a prerequisite to the closing of the street.

Where a case is agreed upon and submitted, in a controversy, without action, under § 372 of the Code of Procedure, the admissions contained in the case are binding on the parties agreeing to it, and although there may appear in the case evidence casting doubt on the truth of the matter admitted, it will be presumed that there is other evidence not produced, or other reasons which induced the admission.

In a dispute concerning the title to land forming part of an old road, where the question was whether it had been closed, it was admitted by the case agreed on, that when the road was closed, the title to the land would revert to the plaintiff, but according to the deed under which the plaintiff claimed, and which was set out in the case, the court was of opinion that the title to the land would not so revert; *Held*, that the admission was conclusive.

If the admission was improvidently made, the injured party has his remedy by motion, to strike out or amend the admission.

CASE agreed upon and submitted in a controversy without action.

The facts, as stated in the case agreed upon, are as follows:

In the year 1860, Daniel B. Fearing, deceased (under whose will the plaintiffs were executors, with a power of sale in reference to the premises in question), became possessed in fee, by purchase, of the following described premises: "Certain lots of land situate in the Twelfth Ward of the city of New York,

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known as numbers 479, 480, 295, 296, 297, 298, 299 and 300, on Map of Lands in the city of New York, known as 'Elmwood,' belonging to the estate of Herman Thorn, deceased, surveyed by James E. Serrell, city surveyor, and filed in the office of the register of the city and county of New York, in tin case number 216, bounded and described as follows, to wit: *Beginning at a point on the northeasterly corner of Broadway and Ninety-third street, and running thence northwardly along the easterly side of Broadway, 102 feet, to the southerly side of the road or lane commonly called Apthorp's or Jauncey lane; thence eastwardly along the southerly side of said Apthorp's or Jauncey lane, 138 feet and 10 inches; thence southwardly along the westerly side of Tenth avenue, 100 feet and 1 inch; and thence westwardly along the northerly side of Ninety-third street, 138 feet and 8 inches, to the point or place of beginning, together with all the right, title and interest of the parties of the first part of, in and to the lots known as numbers 481 and 482, being the one-half part of the road or lane on the northerly side of the lots above conveyed, commonly called Apthorp's or Jauncey lane, running to the center line of said lane, as the same is laid down on said map."*

Both Apthorp's lane and the Bloomingdale road were then used as public highways; the Bloomingdale road being an old road, having been in use for 100 years.

At the time of the sale by the plaintiff's executors, hereinafter mentioned, the Bloomingdale road and Apthorp's lane were still used as public highways.

The case contained the following admissions:

"No special proceedings have been taken to close the Bloomingdale road or Apthorp's lane, but neither said road or said lane appear upon the map made by the commissioners under the act passed April 3, 1807, and were not established as streets upon such map.

"The commissioners of the Central Park, prior to the death of Daniel B. Fearing, in accordance with the laws of 1867, ch. 697, § 2, caused to be made two similar maps of the streets, avenues, &c., retained by them, and caused the same to be duly certified and filed as therein provided; and neither the Bloom-

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ingdale road nor Apthorp's lane, nor any portion of either of the same, appear or are in any manner referred to on said maps, and upon the same no intervening street or avenue appears between the Boulevard and 10th avenue, and between 93d and 94th streets, and no portion of said Bloomingdale road or of said Apthorp's lane, here in question, appears on said maps, or has in fact been taken for any public use.

"It is admitted that when the said Bloomingdale road and said Apthorp's lane shall have been closed by law, the title to lots Nos. 15 and 16, and to lot No. 13, being the abutting half of each of the same, will revert to the estate of Daniel B. Fearing as the owner of the abutting land."

The plaintiffs caused to be made a map, on which the property above described was laid down and divided into lots, numbered from 9 to 16 inclusive. On this map, lot No. 13 was formed entirely of the southerly half of what was known as Apthorp's lane; and lot No. 15 lay partly, and lot No. 16 entirely, in Bloomingdale road.

On March 17th, 1871, lots Nos. 13, 15 and 16, with others, were sold at auction to the defendant Robert Irwin, who sold a half interest in his purchase to the defendant Richard Campbell, and so notified the plaintiffs, and desired the deeds to be made in their joint names.

The plaintiffs thereupon tendered to the defendants a deed for No. 13. The defendants declined to complete, on the sole ground that Apthorp's lane was still open, and that the plaintiffs could not convey the said lot by a valid title free of incumbrance.

The plaintiffs in like manner made a tender as to lot No. 16, and defendants refused to complete, on the sole ground that the Bloomingdale road was not closed by law, and that the plaintiffs could not convey the said lot by a valid title free of incumbrance.

The plaintiffs, in like manner, offered to complete the sale of lot No. 15, provided the defendants would close the purchase of lot No. 16, which they had rejected, or provided by an agreement or clause in the deed, any interest should be excluded in lot No. 16, in case the said road should be held to

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be still unclosed, and reserving the same, and any right hereafter to arise to the abutting owner, to the estate of said D. B. Fearing.

Each of these offers the defendants refused, but offered to close the title to No. 15, or to such portion of it as lay east of the Bloomingdale road, on receiving a deed therefor, without any exception; this the plaintiffs refused.

The questions submitted to the court were as follows:

1. Was the Bloomingdale road closed according to law, and had Daniel B. Fearing, or his estate, acquired title thereto, in fee simple, as abutting owner to the center thereof?

2. Was Apthorp's lane so closed, and did such title exist thereto?

3. Could the plaintiffs convey lot No. 16 and lot No. 13, or either of them, in accordance with the terms of sale; and were the defendants justified in rejecting title to said lots, or either of them?

4. Were the plaintiffs bound to convey lot No. 15 without any reservation as to any rights the heirs or estate of Daniel B. Fearing might thereafter become entitled to as owners of land abutting on the Bloomingdale road, and excepting any interest therein?

5. (1.) Are the plaintiffs entitled to a judgment compelling the defendants to specifically perform their contract as to each or any of the lots 13, 15 and 16. (2.) Are the defendants entitled to judgment in their favor discharging them from said purchases? (3.) In case the Bloomingdale road is not closed, were the defendants entitled to an absolute deed of No. 15 alone, without reserving the interest in the road when closed?

John S. Cadwallader, for plaintiffs.

Kitchel & Jelliffe, for defendants.

BY THE COURT.*—JOSEPH F. DALY, J.—It is necessary to consider separately the questions submitted with respect to Bloomingdale road and Apthorp's lane.

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As to the lots 15 and 16, involving the title to Bloomingdale road, it appears from the description of the premises in the deed to the plaintiffs' testator, that Daniel B. Fearing was never seized of the fee to the center of Bloomingdale road. It is admitted in the case, that when the Bloomingdale road shall be closed by law, the title to lots 15 and 16, being the abutting half of the same, will revert to the estate of Daniel B. Fearing, as the owner of the abutting land; but this admission is contrary to the law upon the evidence of his title afforded by the deed to him, and the court cannot discuss the law upon a fact which does not exist, nor give a judgment which must be wholly inoperative. The description in the deed to Fearing of the lots 479, 480, 295, 296, 297, 298, 299 and 300 on the map of "Elmwood," filed in the office of the register of the city and county of New York, in tin case No. 216, is as follows: "Beginning at a point on the northeasterly corner of Broadway and Ninety-third street, and running thence northwardly along the easterly side of Broadway, 102 feet, to the southerly side of the road or lane, commonly called Apthorp's or Jauncey lane; thence eastwardly along the southerly side of said Apthorp's or Jauncey lane, 138 feet 10 inches; thence southwardly along the westerly side of Tenth avenue, 100 feet 1 inch; and thence westwardly along the northerly side of Ninety-third street, 138 feet 8 inches, to the point or place of beginning." The boundary on Broadway (or Bloomingdale road, as it is called in the case) does not commence at the corner of Broadway and Ninety-third street, which would be the intersection of the center lines of those streets, but commences at the northeasterly corner of those streets; the boundary also does not run along the line of Broadway, nor along Broadway, either of which would mean the center line of Broadway, but runs along the easterly side of Broadway. This excludes the whole land used as the public street, and gives no title to the soil of the street from the easterly side to the center of the street (*Child v. Starr*, 4 Hill, 382; *Hammond v. McLachlan*, 1 Sandf. 341). The fee to the street will not, therefore, revert, when the street is closed, to the plaintiffs, and they had no title to lot 16, nor to part of lot 15, which they attempted to sell to the defendants.

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The defendants are not bound to take No. 16, nor No. 15, and cannot elect to take so much of No. 15 as the plaintiffs had the right to convey, but must take the whole lot No. 15, or reject the whole. The fact that the act of 1867 (Laws of 1867, vol. 2, p. 1750) declares that on any street being closed in pursuance thereof, the abutting owners shall be seized in fee simple absolute to such street, cannot defeat the title of the true owners of the fee of such streets, if they have not conveyed to the plaintiffs' testator, nor prevent the land reverting to such owners.

With respect to lot No. 13, being one-half of Apthorp's lane, the case is different, plaintiffs under the above mentioned deed to their testator having acquired title to "one-half part of the road or lane on the northerly side of the lots above conveyed, commonly called Apthorp's or Jauncey lane, running to the center line of said lane as the same is laid down on said map." The question in respect of Apthorp's lane and lot 13 is, whether at the time of the sale by plaintiffs to defendants, Apthorp's lane was closed according to law, it being admitted that when Apthorp's lane is so closed the title to lot 13 will revert to the plaintiffs' testator's estate.

The lane was open and used as a public street at the time of the passage of the act (Laws of 1867, ch. 967), entitled "An act to alter the map or plan of certain portions of the city of New York, and for the laying out and improvement of the same." The first section invests the board of commissioners of the Central Park with exclusive power to lay out and establish streets, &c., and also to "designate and direct what part or parts of any streets, avenues, roads, public squares and places now laid out, shall be abandoned and closed," within that part of the city bounded on the north by 155th street, south by 59th street, east by 8th avenue, and west by Hudson river. The second section provides that the board shall make two maps, showing the streets, &c., they shall lay out or retain, and file one in the street commissioners' office, and the other in the office of the commissioners of the Central Park. The third section provides that the maps, when so filed, shall be final and conclusive, as well in respect to the mayor, aldermen and commonalty

of the city of New York, as in respect to the owners and occupiers of lands, tenements and hereditaments, within the boundaries aforesaid, with the same intent and effect as if the same had been laid out and established by the commissioners under the act of April 3d, 1807; and it further provides that "all streets, avenues, roads, public squares, and places, and the grades therefor, heretofore laid out and established within the district mentioned in the first section of this act, which shall not be shown or retained on the maps to be filed by the commissioners as before mentioned, shall, from and after the time of filing of said maps, cease to be or remain public streets, avenues, roads, squares or places. And the abutting owners on such of said streets, avenues and roads, as have been opened or ceded, and as shall be abandoned or closed under the provisions of this act, shall become and be seized in fee simple absolute therein to the center line thereof in front of his or their lands respectively . . . but subject, however, to any existing right of the mayor, aldermen and commonalty, to maintain and keep in order any sewer, croton water-pipe, &c., that may have been constructed in any street, avenue or road so closed." The section further provides that all damage to any land, or any street, road or avenue, by reason of closing such street, shall be ascertained and paid in the manner provided in chap. 52, Laws of 1852, sections 3 and 4.

It is admitted, that Apthorp's lane is within the district mentioned in the first section of the act of 1867; that the commissioners of the Central Park have made and filed the maps, pursuant to the 2d and 3d sections of the same act, above mentioned; and that Apthorp's lane does not appear on such maps.

Prior to the act of 1867, the general provisions of law respecting the closing of streets and roads in this city, are to be found in chap. 213, Laws of 1818. By that act, the legislature gave the corporation the right to apply to the Supreme Court for the appointment of commissioners, to make estimate of loss and damage to the respective owners in consequence of closing any street, road, lane or alley, and provides that upon the confirmation of their report of such estimates, the mayor, aldermen and commonalty shall become seized in fee simple absolute of

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all such streets, roads, lanes or alleys, and may at any time thereafter take sole and exclusive possession of the same, and shall pay to the respective parties the sums due them under the report. This act has not been repealed, and is not affected by the act of 1867, and whenever the mayor, aldermen and commonalty choose to take the fee of any closed street, road, lane or alley, they will proceed according to its provisions. But it does not affect the question of closing Apthorp's lane, under the act of 1867.

The legislature has the supreme control over the streets of this city, and may exercise it directly or through delegated powers vested in local authority (*Met. Bd. Health v. Heister*, 37 N. Y. 672; *Darlington v. Mayor*, 31 N. Y. 164; *People v. Kerr*, 27 N. Y. 188).

It has delegated the power to close streets to the corporation of the city, and it may, as in this case, delegate such power to the commissioners of the Central Park: but in neither case is the legislature precluded from exercising such power itself directly, any more than it would be precluded from revoking or transferring the powers granted to the local authorities.

The legislature in the act of 1867 gives power to the commissioners of the Central Park to "designate and direct" what part or parts of any road shall be abandoned and closed. It provides that such designation and direction shall be evidenced by the filing of maps by the commissioners, on which the roads to be closed shall not be shown or retained, and it declares that all such roads not shown on such maps shall, from and after the time of filing of said maps, cease to be or remain public roads. This is as direct and explicit as if the roads not retained on the maps had been expressly named in the act of 1867, and closed by name and particular designation. There is no proceeding necessary as a prerequisite to the closing of a street or road in the district named, when the legislature declares it closed, except the direction or designation by the Central Park commissioners in their maps. There is, of course, certain damage accruing to abutting owners by the loss of right of way. It is similar in some respects to the damage accruing to owners when the grade of a street is raised or lowered, and

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for this reason the act of 1867 provides that the damage by reason of closing such street or altering the grade shall be ascertained and paid in the matter specified in the act of 1852 (Laws of 1852, ch. 52, §§ 3 and 4). The act of 1852 (chap. 52) is entitled "An act to make permanent the grades of the streets and avenues of the city of New York," and provides (p. 46) that when the grade of any street or avenue shall be changed or altered, the assessors shall estimate the loss and damage to the owners of land fronting on the street or avenue by reason of such change, and make an award therefor which shall be assessed as provided by the act of 1813 (Laws of 1813, ch. 86, § 175). The 175th section of the act of 1813 (chap. 86) provides for the appointment by the mayor, aldermen and commonalty, of assessors to estimate the expense of making sewers, &c.

It is apparent that the legislature intended that owners damaged by the closing of any road, under the act of 1867 (chap. 697) should be paid their loss; which should be ascertained by assessors appointed as in section 175 of chap. 86 of laws of 1813, by the corporation, and not by commissioners appointed as in section 1 of chap. 213, of laws of 1818 by the Supreme Court, for the reason that by the closing of roads under the act of 1867, no private property is taken for public use, and the fee of the road closed is not taken by the corporation, but is vested in the private owners.

But in either case (closing of the road or altering the grade where no private property is taken for public use, and the damage to abutting owners is the loss of right of way), the estimate of loss and award of damages is not a prerequisite to the closing of the street, but a remedy for the damage caused by it, and the proceedings to assess such damage are consequent upon the closing or alteration of the grade, and cannot precede it. The filing of the maps by the Central Park board, pursuant to the act of 1867, and the express declarations of the act, close the roads not shown on the maps, without any other form or authority, and subject to no other proceeding or condition, and the persons damaged are left to their remedy under the acts of 1852 and 1813.

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Apthorp's lane is an ancient road not laid down on the maps of the commissioners of 1807, and not a part of the general plan of the city. It existed prior to the act (Laws of 1803, chap. 70), which provides that no new street shall be laid out without permission of the common council (see sections 10 and 11), and although not "laid out" by any authority of the common council, was laid out, planned, or set apart by original dedication to public use. As such it is included in the roads "laid out" provided in the first section of the act of 1867, which act does not specify that the roads to be closed must have been "laid out" by any authority or in any particular manner; and no reason whatever appears for discriminating between roads laid out by city authority and those dedicated from time immemorial to public use, in construing the act of 1867. The legislature has equal authority over both kinds of roads, so far as the public user is concerned, and the intent of the act appears to be to remodel the whole district embraced between 59th and 155th streets, and 8th avenue and Hudson river.

The language of the act, that roads not shown nor retained on the maps "shall cease to be or remain public roads," &c., considered with respect to the context and the manifest intention of the act, may be read as equivalent to an express enactment that such roads shall be "closed." The term "closed" applied to a road has a technical meaning, and the closing of a road has legal consequences perfectly well established. The consequence of closing a public road is that the possession of the land reverts to the owners of the fee of the road, relieved from the incumbrance of public user. The act of 1867 expressly declares that the "abutting owners shall become and be seized in fee simple absolute to the center line of the roads abandoned or *closed* under the provisions of the act, subject to the right of entry of the corporation to maintain and keep in order the sewers, water-pipes, &c.; and this enactment, taken with the use of the term "closed," in the provision that the board of Central Park commissioners shall designate and direct what roads shall be abandoned and *closed* (sec. 1); and that the damage to owners by reason of the *closing* of such roads shall be assessed (sec. 3); and that the commissioners may file maps when-

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ever they deem it proper, of the streets, avenues, and public squares or places which they have determined to abandon or *close* (sec. 3); and that after such filing their power to abandon or *close* shall cease and determine (sec. 3), indicates that the legal and technical effect of closing streets and roads, &c., shall follow the action of the commissioners.

The views I have arrived at therefore are that :

1. Apthorp's lane was closed according to law, and the plaintiffs could convey lot No. 13 in accordance with the terms of sale.

2. That the plaintiffs are entitled to judgment in their favor, compelling defendants to specifically perform their contract as to lot 13.

3. That the defendants are entitled to judgment, discharging them from their purchases of lots 15 and 16.

DALY, CH. J.—The want of title to lot 16 and to a part of lot 15, is a grave question which was not discussed upon the argument; the case being submitted upon an admission that if Broadway or Bloomingdale road is closed, the estate of Fearing will be entitled to lots 15 and 16. As the law has been expounded in this State, it would seem to warrant the conclusion of Judge Daly, that Fearing's estate has no title to lot 16, and only to a part of lot 15; but the point, in my mind, is not altogether free from doubt, and should not, I think, be disposed of without hearing the parties. I agree with Judge Daly, that we cannot act upon the admission if other facts in the case show that there was no foundation for it.* We cannot decree that a party should take from the other party a conveyance of land, when, upon the facts before us, it appears that the conveyance would give him no title to the land. In all other respects, I agree in the conclusion at which Judge Daly has arrived; but think that a reargument of the question, whether Fearing's estate has any title to the land abutting on Broadway, should be ordered.

On a reargument, the following opinion was delivered:

BY THE COURT.*—J. F. DALY, J.—After the reargument,

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my opinion, as to the construction of the deed to the plaintiffs' testator, remains unchanged, that no part of the Bloomingdale road was conveyed by the description of lots Nos. 479, 480, 295, 296, 297, 298 and 300, and a late case seems to confirm this view (*Chapman v. Wheeler*, 5 Alby. Law Jl. 337).

On the other hand, I am inclined to think that the effect of the admission in the case is to conclude the defendants as to the right of the estate, which plaintiffs represent, to the lots Nos. 15 and 16, when Bloomingdale road shall be closed by law.

This admission belongs to the class of solemn judicial admissions, which are made as a substitute for proof of the fact admitted. They dispense with proof as to such fact, and, although there may appear in the case evidence casting doubt on the truth of the matter admitted, it is to be presumed that there is other evidence not produced, or other reasons which induce the admission. Thus, notwithstanding the terms of the deed, there might be other conveyances to the plaintiff's testator, on which the admission was based, and proof of which is dispensed with by making such admission (Green. Ev. §§ 27, 186).

If the admission were improvidently made, the injured party has his remedy, by motion to strike out or amend the admission (1 Gr. Ev. § 206), but while it exists in the case it would appear to be conclusive. The result is, that the plaintiffs are entitled to have judgment in respect of lots 15 and 16, as well as of lot 13. • The reasoning in the former opinion of the general term, upon the question as to whether Apthorp's lane was closed by the act of 1867, applies to the Bloomingdale road, and need not be repeated here. Both are ancient highways, dedicated from time immemorial to public use, and were omitted from the maps of the Central Park commissioners under authority of the act of 1867, discussed in the former opinion.

The plaintiffs should have judgment, directing defendants to complete their purchase of all the lots in dispute.

Judgment for plaintiffs.

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MORRIS ALKUS *et al.* v. DAVID RODH.

In an action for fraudulently entering judgment on a false affidavit of service of the summons, the plaintiff put in evidence the report of a referee appointed on a motion to vacate the judgment in the former suit, reciting that it had been referred to him to take testimony and report as to whether the summons was ever served, and that he had taken testimony, and that in his opinion it had not; also an order, made by the court on the report of the referee, vacating the judgment. *Held*, that this was not sufficient to show that the question of whether the summons had ever been served was *res adjudicata* between the parties.

APPEAL by plaintiffs from a judgment of the general term of the Marine Court affirming a judgment, entered by direction of a judge at trial term, dismissing the complaint.

The action was brought to recover damages for fraudulently entering up judgment in this court, on Sept. 24, 1869, for \$803 66, by defendant against plaintiffs, by means of a false affidavit of service of summons, and for fraudulently issuing an execution on such judgment to the sheriff, under which execution the store of plaintiffs was closed and their property levied on. The complaint further alleged that on October 19th, 1869, this court, by an order made in such action, vacated such judgment for want of service of the summons.

The answer denied every allegation of the complaint, except that a judgment was entered against plaintiffs on Sept. 24th, 1869, after due and lawful service of summons and failure to answer, and except that an order was made by this court that the said judgment be vacated.

On the trial the plaintiffs produced the record of the alleged fraudulent judgment, which contained the summons, affidavit of service on both defendants therein, affidavit of no answer, complaint, order to assess damages by the sheriff's jury, mandate to the jury, inquisition of the jury, bill of costs, and order for judgment, dated Sept. 23d, 1869. The plaintiffs next produced the report to this court, of the referee in the same action, dated Oct. 8th, 1869, reciting that in pursuance of an order made in said action on Sept. 30th, 1869, by which it was

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referred to him to take the oral testimony of witnesses for plaintiff and defendants, and to report the testimony to the court, together with his opinion as to whether the summons was ever served upon the defendants or either of them, he had examined under oath, the witnesses produced by the plaintiff and the defendants in said action, and heard the arguments of counsel for the respective parties, and that the testimony so taken was annexed to his report, and he reported that in his opinion the summons in that action was never served on the defendants or either of them.

The plaintiffs next produced an order of this court dated Oct. 19th, 1869, reciting the reading of the above report and opinion, and the reading and filing of the notice of motion, and the hearing of counsel for defendants for the motion and for plaintiff against the motion, and ordering that the aforesaid judgment be vacated and set aside, and marked on the docket, "Vacated by order."

Plaintiffs further offered a paper dated Oct. 19th, 1869, signed by the attorney for the plaintiff in said judgment, countermanding the execution issued thereon. Plaintiffs then proved the visit of the sheriff with said execution, the amounts paid the sheriff's man for allowing them to keep their store open, and the sums paid in counsel fees to have the judgment vacated as aforesaid.

The court dismissed the complaint on the ground that there was not proof sufficient to sustain the allegations of the complaint.

David Crawford, for appellants.

J. Solis Ritterband, for respondent.

BY THE COURT.*—J. F. DALY, J.—It appears to me that the judgment should be affirmed. Without passing on the question whether the decision of a motion to vacate a judgment, on the ground that a summons had not been served therein, would estop either party to the action from denying

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any matter determined in such motion, it is enough to say that the plaintiff in this action did not prove enough to show a former adjudication upon the question of the service of the summons in the Common Pleas. The records produced to sustain the allegation that the summons was not served, do not show that that question was ever litigated between the parties or at issue between them. "The principle upon which judgments are held to be conclusive upon the parties, required, that the rule should apply only to that which was *directly in issues* and not to everything which was incidentally brought into controversy during the trial" (Greenl. on Ev. vol. 1, § 523). The judgment must be according to the allegations and the proof. To show that the matter alleged to be finally determined was at issue between the parties, it is necessary to produce the pleadings. To show that it was actually litigated between them, it is necessary to produce the pleadings and sometimes the evidence on the trial. No less strict rule can be applied to adjudications of motions than to determinations of actions. It was the duty of the plaintiff here to show that the question of the service of the summons was directly at issue in the motion in this court. To do so he should, at least, have produced the moving papers and those read in opposition, and the order referring the matter to the referee. It was not enough to produce the referee's report reciting the order of reference and giving an opinion merely on the very vital point involved, and then to produce an order which does not state on what ground the decision is based. For all that appears it may be that the judgment was sought to be vacated on several grounds besides the falsity of the affidavit of service, and that on one of these other grounds the court granted the motion. The plaintiff below did not make out even a *prima facie* case.

Judgment affirmed.

Rigney v. White.

CAREY RIGNEY v. JOHN WHITE *et al.*

In view of the statute prohibiting servile labor on Sundays, a contract to pay demurrage will, in the absence of any proof to the contrary, be deemed to intend to mean demurrage for working days, and to exclude Sundays.

APPEAL by plaintiff from a judgment of the First District Court.

The action was brought to recover the freight and demurrage on a cargo of coal, shipped by the defendants, the freight being stated in the bill of lading to be "forty cents per ton, and \$4 per day after six lay days."

On the trial it was admitted that the cargo had been duly delivered, and that part of the freight and demurrage were still due, and that from the commencement of the demurrage days to the receipt of the cargo there were six Sundays. For these Sundays plaintiff claimed demurrage should be paid. This claim defendants disputed, and were sustained by the justice, who gave judgment for the plaintiff for the freight and demurrage claimed, less \$24, the demurrage for the six Sundays.

E. H. Hobbs, for appellant.

Goodrich & Wheeler, for respondents.

BY THE COURT.*—LARREMORE, J.—By the bill of lading, the freight of the coal was fixed at forty-five cents per ton, and \$4 per day after six lay days. The only question raised by this appeal is, whether the plaintiff was entitled to demurrage for the six intervening Sundays included in the demurrage days.

The nature of the contract must be considered in interpreting its provisions, as well as the statute with reference to which it is presumed to have been made. The laws of this State prohibit any servile laboring or working on the first day of the week, unless in certain excepted cases (2 R. S. p. 936, § 66).

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There can be no doubt that the discharging of the cargo from plaintiff's boat was servile laboring and working, within the meaning of the statute. As such, it could not rightfully be performed on the days for which demurrage is claimed, but should be excluded (*Cochran v. Retberg*, 3 Espinasse, 121; *Cargo of the Mary E. Taber*, 1 Benedict, 106).

In view of the statute, *and in the absence of any proof to the contrary*, I think the days for which demurrage was intended to be charged were working days, and that Sundays were properly excluded. The judgment should be affirmed.

Judgment affirmed.

JOHN A. MOODY v. EDWARD B. LEVERICH *et al.*

A servant wrongfully discharged by his master cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages on the ground of a constructive service. His only remedy is an action for the breach of the contract of hiring.

When wrongfully dismissed, he is restricted either to an action to recover for the services actually rendered, or to a general action for damages for the breach of the contract; in which he may recover any amount due for services, and also compensation for damages sustained by the further breach of the contract, in wrongfully dismissing him.

APPEAL by defendant from a judgment of the general term of the Marine Court, affirming a judgment entered upon the decision of a judge at trial term.

The action was brought October 28th, 1870, to recover wages due, and the complaint alleged that the plaintiff had been hired by the defendants to act as superintendent of certain machine works for a year from March 23d, 1870, at the yearly salary of \$3,000, payable in monthly installments, payable at the expiration of each month. That, on August 1st,

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1870, he was wrongfully discharged. That he had always held himself ready and willing to perform the services for which he was engaged, but that the defendants had refused to allow him to do so. That he had not been paid for any services rendered since June 23d, 1870. That on September 23d, 1870, there was due him \$250, and on October 23d, 1870, the further sum of \$250, making a total of \$500, which he claimed to recover.

The defendants, by their answer, set up as a bar to the action that, on September 5th, 1870, the plaintiff had commenced an action in the Marine Court for the same cause of action, to wit, the wrongful dismissal of the plaintiff by the defendants on August 1st, 1870, and therein had claimed to recover his salary for the months ending July 23d, and August 23d, 1870, and that in that action he had recovered a verdict for the amount claimed less an admitted counter-claim due from the plaintiff to the defendants, to wit, \$500 less the sum of \$32 96. On the trial the facts appeared as stated in the pleadings. A motion was made by the defendant to dismiss the complaint upon the ground that the plaintiff had recovered judgment against the defendants for damages for a breach of the same contract set up in the complaint, and for the same cause of action, to wit, the wrongful dismissal of the plaintiff by the defendants, and their refusal to permit him to render further services.

The motion was denied, and the defendants excepted.

The judge rendered a decision in favor of the plaintiff for the amount claimed.

Convers & Lyman, for appellants.

J. M. Dixon, for respondent.

BY THE COURT.*—DALY, CH. J.—This action is founded upon the assumption that, if the contract for the hiring of the servant is for a year, at a salary payable in monthly install-

* Present, DALY, CH. J., ROBINSON, and J. F. DALY, JJ.

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ments, and the master wrongfully dismisses the servant before the expiration of the year, the servant, after his dismissal, may sue for and recover each installment as it becomes due, if he has held himself, during the time, ready and willing to render the service contracted for. That there is, in other words, in such a case, a constructive service on the part of the servant.

This idea of a constructive service is founded upon a decision of Lord Ellenborough (*Gandell v. Pontigny*, 4 Camp. 375), where a servant having been discharged before the expiration of the quarter for which he had been engaged, Lord Ellenborough said that as the plaintiff had served a part of the quarter, and been willing to serve for the residue, he might, in contemplation of law, be considered to have served the whole.

This was merely a *nisi prius* decision, and whatever weight it may have derived from the eminence of Lord Ellenborough, it possesses no longer; for, as a rule of law, it must now be regarded as repudiated.

In *Archard v. Hornor* (3 Car. & Pay. 349) it was held, that if the servant is turned away improperly before the end of the year for which he was engaged, he cannot recover upon a count stating the contract to be one for an entire year, and that if he sues for wages under the contract, he can recover only for the period during which he served. In other words, if he sues upon the contract, for the wages contracted for, performance is essential to a recovery.

In *Smith v. Haynar* (7 A. & El. 544), the court approved the decision in *Archard v. Hornor*. The four judges who delivered opinions, expressed their dissatisfaction with Lord Ellenborough's decision in *Gandell v. Pontigny*. Lord Denman said that *Archard v. Hornor* was grounded on the better reason. Williams, J., that it had more reason and authority to support it. Patterson, J., declared that if it were necessary to choose between the two, he should prefer *Archard v. Hornor*, and Coleridge, J., said that he was not satisfied with the decision in *Gandell v. Pontigny*.

A few years afterwards the case of *Aspen v. Austin* (5 Ad.

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& El. (N. S.) 691) came up in the same court. It was an action for a breach of covenant in wrongfully dismissing the plaintiff, whom the defendant had covenanted to employ for a certain period, at a fixed weekly salary. Lord Denman said that the defendant had covenanted to pay weekly sums to the plaintiff for three years, on condition of the plaintiff performing what was, on his part, a condition precedent; and that the plaintiff would be entitled to recover these sums, whether he performed the condition or not, if he were ready and willing, and offered to perform it, but was prevented by the defendant from doing it.

This was sixteen years after the decision of *Archard v. Hornor*, and seven years after Lord Denman and his associates had, in *Smith v. Hayward*, approved *Archard v. Hornor*. It was a decision upon the pleadings, and from what followed in the same and other courts afterwards, I presume that Lord Denman did not give much consideration to the point, as judgment was given for the defendant upon the pleadings, and the point was, therefore, not directly involved.

In *Fewing v. Tisdall* (1 Exch. R. 295), the servant was dismissed without a month's warning, and her wages being paid only up to the time of her dismissal, she brought an action to recover a month's wages, commencing from the day of her dismissal. It was held, that the action could not be maintained; all the judges agreeing that *Archard v. Hornor*, which, Pollock, C. B., said, was recognized by all the courts, was decisive of the case.

In *Elderton v. Emmons* (6 Man. Gr. & Scott, 178), Baron Parke said, that to hold, where the employer determined the relation by a wrongful dismissal, that the servant may entitle himself to wages for the whole term, by being ready to serve, was a doctrine, that, if sanctioned, would be of pernicious consequences.

In the note of Mr. Smith, to *Cutter v. Powell* (2 Smith's Leading Cases, 20), that learned commentator states three remedies that a servant has, who has been wrongfully dismissed; the second of which he states as follows: "2. He may wait till the termination of the period for which he was hired, and may

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then *perhaps* sue for his whole wages in *indebitatus assumpsit*, relying on the doctrine of constructive service," for which he cites Lord Ellenborough's decision in *Gandell v. Pontigny*.

In *Goodman v. Pocock* (15 Ad. & El. (N. S.) 582), Patterson, J., said that Mr. Smith had very properly expressed himself with hesitation as to this second proposition; and Erle, J., in referring to it, said, "I think the servant cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages, on the ground of a constructive service after dismissal. I think the true measure of damages is the loss sustained at the time of dismissal."

In *Whitaker v. Sandifer* (1 Duval (Ky.), 261), and in *Chamberline v. McAllister* (6 Dana (Ky.), 352), C. J. Robertson, a very eminent judge, held that readiness and willingness to perform, after a wrongful discharge, was not equivalent to full performance, and that all the employee was entitled to recover was the actual damages he sustained for the disappointment and loss of equally profitable employment.

In *Clark v. Marsiglia* (1 Den. 317), the defendant delivered to the plaintiff a number of paintings to be cleaned and repaired, at a certain price for each, and after the plaintiff had proceeded to a certain extent in the work the defendant countermanded it, but the plaintiff went on, finished the cleaning and repairing of the pictures, and recovered in this court the full contract price. The judgment was reversed upon the ground that all that the plaintiff could recover was a recompense for the labor done and materials used when the countermand was given, and *such further sum in damages* as might, upon legal principles, be assessed for the breach of the contract. And in *Durkee v. Mott* (8 Barb. 423), an analogous case, a like rule was applied. I cite these two cases, though not strictly cases between master and servant, because they come under, and serve to illustrate, a rule in the law of contracts, which is as applicable to the contract between master and servant as to any other.

I might pursue this examination by citing many cases, both in this country and in England, that are, by analogy, inconsis-

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tent with this doctrine of constructive service, and reasons might be adduced to show that there never was any foundation for it; but I deem it sufficient to rely upon the authority of the cases above cited, to show that it is now wholly repudiated.

In *Thompson v. Wood* (1 Hilt. 96), my former colleague, Judge Ingraham, said that a servant wrongfully discharged had his election to sue for his wages as they became due from time to time, or to bring an action for damages. That if he recovered damages it estopped him from bringing any other action; but that if his action was for wages due when the action was brought, it did not estop him from bringing another action for wages subsequently payable, or an action for damages for the subsequent breach of the agreement.

It may be said, in respect to this case, that the question of constructive service was not necessarily involved, as in the action set up as a bar, the plaintiff recovered only for the wages due at the time of his discharge, which the court held was no bar to the second action, and it may have been treated as an action for damages for the breach of the contract in discharging the plaintiff before the expiration of the year; for although the claim was to recover two months' salary, the action is referred to, by Judge Ingraham, as an action for damages. The referee in that case reported in the plaintiff's favor for the full amount of the salary, and in an action for damages the salary may, in the discretion of the jury or referee, be taken, in the particular case, as an adequate and proper measure of damages (*Smith v. Thompson*, 8 Man. Gr. & Scott, 44). What Judge Ingraham said, therefore, in respect to the right of a servant wrongfully dismissed, to sue thereafter for his salary from time to time, as it becomes due, may be regarded as a *dictum*, and as no authorities for this proposition are referred to by him, I infer that he stated the law as he supposed it to be, upon the authority of Lord Ellenborough's decision in *Gandell v. Pontigny*, and that his attention was not called to the subsequent cases impeaching the soundness of that decision.

In *Heim v. Wolf* (1 E. D. Smith, 73), my late colleague, Judge Woodruff, stated the law much more in accordance with these

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subsequent cases. He said, "Where the employer discharges the person from his employ, he may wait until his wages become due, and then recover them; but that rule is to be taken with restrictions. He recovers, not for services rendered, but damages for breaking the contract, by discharging him before the termination of his agreement—that is, for refusing to employ and pay him according to the contract. If it appears that he was idle and could not obtain other employment, his damages would be the whole compensation agreed on; but if he obtains employment, then he is entitled only to a partial recovery."

In *Huntington v. The Ogdensburg, &c. Railroad Co.* (33 How. Pr. 416), the plaintiff was employed for a fixed period at a monthly salary, payable on the first of every month. Before the expiration of the period agreed upon, and on the sixth day of the month of June, he was dismissed by the defendants, against which he protested, and offered to continue his services. The plaintiff brought an action to recover his salary for the month of June, and it appearing that he had obtained other employment during the month, Potter, J., said: "The plaintiff's right in this action, as I understand the law, is not for services actually rendered, but as for services offered to be performed, which the defendants refused to receive, and that thereby the plaintiff is entitled to recover the amount of wages he was to receive by virtue of his contract. * * * If he seeks and finds employment, as seems to be his legal and moral duty, then the damages he would otherwise be entitled to recover by reason of the breach, are to be diminished or regulated by his actual loss, depending upon the actual value to him of the benefits obtained, or to be obtained, from such new employment." Although the law, as stated in the outset of these remarks, is not in accordance with the authorities that have been cited, the conclusion is correct that the month's wages may be the proper measure of damages, less the value of the employment obtained by the plaintiff during the month; treating the action as one for the recovery of damages for the breach of the contract in wrongfully dismissing the plaintiff, and not for the recovery of

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a month's wages upon the contract, the plaintiff having been dismissed before the wages for the month had been earned.

In *Van Alstyne v. The President, &c. of the Indiana, &c. Railroad Co.* (34 Barb. 28), the plaintiff was employed for a year at a monthly salary. During the year, the plaintiff was discharged at his own request, the agreement was vacated by mutual consent, and the plaintiff was paid up in full on the day when he left. He afterwards sued the defendants for two months' salary accruing after he left, and obtained judgment by default. He then brought another action to recover his salary for the two months ensuing, and the court held that the defendants, by suffering the previous judgment to go by default, were not precluded from setting up in the second action that the agreement for the year's service had been vacated by mutual consent. The plaintiff in the case now before us relies strongly upon this case; but I do not see that it has any material bearing upon the question under consideration.

Regarding it as settled, upon the authority of the cases which I have cited, that there can be no recovery of the wages stipulated for by the contract, except where the services contracted for have been rendered, it follows that the remedy which the servant has for any loss or injury he may sustain by his wrongful dismissal before the expiration of the period for which he was engaged, is a general action for damages. If at the time of his discharge any amount is due by the terms of the contract, he may of course sue upon the contract and recover it (*Archard v. Hornor, supra*; *Peck v. Burr*, 10 N. Y. 294). If, by the contract, his wages are payable by the month, or the quarter, and by being dismissed before the period arrives he is unable to render the services which, by the terms of the contract, entitle him to the monthly or quarterly stipend, he may, if he thinks proper, treat the contract as rescinded, and sue to recover for the value of the services actually rendered; or he may bring an action to recover damages for the breach of the contract; and in that action any installment that may have become due to him by the terms of the contract, or the value of the services rendered up to the time of his discharge

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(where he is discharged before the expiration of the month or quarter), will be taken into account and allowed him in adjusting the measure of his damages; but if he were fully paid up to the time of his discharge, then the sole measure of his damages will be the loss or injury occasioned by the breach of the contract (*Classman v. Lacaste*, 28 Eng. Law & Eq. R. 130; *Goodman v. Pocock*, 15 Ad. & El. 576; *Hochster v. De La Tour*, 2 E. & Bl. 691; *French v. Brookes*, 6 Bing. 354; *Smith v. Thompson*, 6 Man. Gr. & Scott, 44; *Emmons v. Elderton*, 4 House of Lords Cases, 624, on appeal, and in 4 Man. Gr. & Scott, 479, and in 6 Id. 160; Smith's Law of Master and Servant, p. 94, notes 9, 99, 100; Mayne on Damages, pp. 107, 108, 109).

In this action ample, full, and final satisfaction is obtained, and the jury, therefore, in assessing the damages, would be justified, in the language of Lord Campbell, "in looking at all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial" (*Hochster v. De La Tour*, *supra*). In this action, he recovers all the damages he suffers by the breach of the contract, or that may ensue to him in consequence of it, and any amount that may be due to him by the terms of the contract, and the value of any unrequited service he may have rendered up to the day of his discharge. This is, therefore, the appropriate remedy. He cannot pursue both—that is, he cannot sue upon a *quantum meruit* for the services actually rendered and also have an action for damages; because by bringing the first action he treats the contract as rescinded, and because he can have but one action where the claims have all accrued and all grow out of the same contract (*Colburn v. Woodworth*, 31 Barb. 382; *Bendernagle v. Cocks*, 19 Wend. 207; *Guernsey v. Carver*, 8 Id. 492; *Goodman v. Pocock*, 15 Ad. & El. N. S. 576; *Classman v. Lacaste*, 28 Eng. Law & Eq. R. p. 141). The good sense, justice, and propriety of the latter rule—that there ought, in such a case, to be but one action—is to my mind very apparent, and is sustained by the authority of the cases above cited; but it must be regarded in this State, at least, as somewhat unsettled, since

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the opinions expressed by Justice Strong, in *Secor v. Sturgis* (16 N. Y. 548), and by Justice Wells, in *McIntosh v. Lowen* (49 Barb. 550).

The general view of the law which I have expressed, and which has been arrived at after an examination of the various authorities brought to our attention by the learned professor who argued this case with so much ability on the part of the defendant, is, in my judgment, the only one that can be reconciled with the rule before stated, that there can be no recovery of the wages stipulated for in the contract, unless the services contracted for were performed; and another rule equally well settled in this State and in England, that it is obligatory upon the servant, when wrongfully discharged, to use diligence to find other employment (*Emmons v. Elderton*, 4 House of Lords Cases, 646; *Costigan v. Mohawk, &c. R. R. Co.* 2 Den. 609; *Dillon v. Anderson*, 43 N. Y. 231; *Hamilton v. McPherson*, 28 Id. 76); a rule which is certainly not consistent with the servant's remaining ready and willing, after his discharge, to fulfill the contract on his part. These rules, however, can be fully carried out and harmonized where the servant wrongfully dismissed is restricted, either to an action to recover for the services actually rendered, or to a general action for damages for the breach of the contract, in which he may recover any amount due for services rendered (for the non-payment of it is a breach of the contract), and also compensation for the damages sustained by the further breach of the contract in wrongfully dismissing him.

The first action which the plaintiff brought must be regarded as an action of this description, for he alleged that from the 23d of March to the 1st of August, 1870, he continued to render his services and to devote his time and skill, as he had agreed to do, at the monthly salary of two hundred and fifty dollars; and that after the 1st of August, 1870, the defendants, without cause or provocation, hindered and prevented him from rendering any further service. Upon these allegations he claimed to recover \$250, as due by the terms of the contract, for services rendered from the 23d of June to the 23d of July, and

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the same sum for the ensuing month, ending on the 23d of August. He recovered \$473 02, and (as he rendered no service after the 1st of August), \$223 02 of this amount must have been recovered as damages to compensate him for the eight days' service from the 23d of July to the 1st of August, and for the breach of the contract thereafter in wrongfully dismissing him.

A judgment in favor of the plaintiff for this \$223 02 could, by the law, have been given upon no other ground. It was a recovery of damages for the breach of the contract, and was a bar to any further action upon the contract. The judgment of the Marine Court, therefore, should be reversed.

Judgment reversed.

JOSIAH B. POLK v. AUGUSTIN DALY.

Plaintiff was engaged to perform as an actor at a certain theater for a definite time, and at a fixed salary, but was discharged before the period for which he was engaged had elapsed. He denied the defendant's right to discharge him, and offered performance on his part, which was not accepted. He then left the city and remained absent until the period for which he was engaged had expired, and did not, during that period, hold himself in readiness to render his services according to the contract, nor did he make any efforts to obtain other employment. *Held*, that he was not entitled to recover anything but the wages due him up to the time of his departure.

APPEAL by defendant from a judgment entered on the verdict of a jury.

Action for wages. The facts are stated in the opinion.

Richard M. Henry, for appellant.

E. Louis Lowe, for respondent.

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BY THE COURT.*—ROBINSON, J.—This action was on a contract for the plaintiff's services as an actor in defendant's theater, from September 15th, 1870, to June 1st, 1871, at a salary of \$65 a week and a benefit, to consist either of one-third the gross receipts, or the net proceeds of the benefit night's receipts.

It was brought in September, 1871, and the plaintiff, in his complaint, alleged he was wrongfully discharged on the 4th of April, and that he was unable thereafter to procure other employment. He did not, however, allege performance or a tender thereof, or a readiness to perform any service during the period for which such salary is claimed, but asked to recover, *firstly*, salary of \$65 per week for eight and a half weeks, and, *secondly*, the sum of \$300 for the night's benefit, of which he claimed to have been deprived by defendant's refusal to afford it to him. The answer, after a general denial as to other matters, admitted the contract; justified the discharge under an alleged breach of plaintiff's obligations by his refusal to perform parts in plays or characters assigned him; alleged that plaintiff thereupon left the city, and remained in or near Baltimore, in the State of Maryland, during the remainder of the season, and did not, at any time after his discharge, perform or offer to perform his contract. The jury, under unexceptionable instructions from the court in that respect, found the plaintiff was justified, under his contract of service with the defendant as an actor, in refusing to act in a part assigned him inferior to the *rôle* of characters which he had agreed to represent, and that he was discharged from his employment without just cause. For this he was awarded in the court below \$688 10 as compensation at the contract rate (\$65 per week), as for full performance, with some addition for the benefit.

Upon his discharge on the 4th of April, the plaintiff, by letters of the 4th and 6th of that month, denied defendant's right to discharge him, and offered performance on his part, which was not accepted. "About a week afterwards he left the city and went to Baltimore, and for the remainder

* Present, DALY, Ch. J., ROBINSON and LOWE, JJ.

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of the period of his engagement spent his time there or in Virginia. He went a-fishing." Subsequent to his discharge he made no effort to get any other employment in his line of business. The justification he offers for this is, "It was *not very easy* to secure employment after the 4th of April. The season in New York theaters had *almost* expired, and they don't engage actors then. *I don't think* I could have got employment of my standing in any theater." Among other grounds for the motion to dismiss the complaint were these: That it appeared from the evidence that the plaintiff made no sufficient tender or offer of his services under the contract; that he made no effort to secure other employment, and placed it out of his power to receive employment from the defendant and others. These several grounds of dismissal were overruled, and defendant excepted. At the conclusion of the testimony, defendant's counsel asked the court to charge; that the plaintiff, by leaving the city, rendered it impossible for the defendant to employ him, and to this the court responded, "If you (the jury) are satisfied that he absented himself *to avoid the engagement*, then he cannot recover." To this qualified charge no exception was taken. Defendant's counsel further requested the court to charge, "that the plaintiff should have applied for employment elsewhere, and cannot recover if he neglected to do so." This was refused, and defendant excepted. Under such circumstances, I am of the opinion the judgment cannot be sustained. First, plaintiff was not entitled to recover either wages *for services rendered*, during the eight weeks following his discharge, or damages ensuing from his unlawful discharge, computable upon the rate of such weekly wages, except upon the assumption that he made and sustained such a tender of performance as was equivalent to actual performance. In a week after his discharge he left the city for the southern States, and for all the subsequent period of his engagement, was absent at the South, and in no way tendered his services, or rendered himself subservient to the objects of the contract, or to any such use of his services as it contemplated. It could, in no respect, be held that he earned wages for services actually rendered in the em-

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ployment of the defendant when he was engaged in his own pursuits or amusements at the South, without having obtained any consent or license of the defendant, or having given the defendant any notice of his remaining subject to immediate recall when wanted, or in some other way offering or continuing a *tender of his services* during this period. There are certain contracts in respect to which *tender* of performance is deemed equivalent to performance, so as to entitle the party ready to perform, to sustain an action for such compensation as full performance would have insured to him; to wit, as upon an agreement for the sale and purchase of real estate, where the vendor has tendered a conveyance (*Shannon v. Comstock*, 21 Wend. 460; *Richards v. Edick*, 17 Barb. 260, and cases cited p. 265); or for goods sold, delivery whereof has been tendered (*Bement v. Smith*, 15 Wend. 493; *Dustan v. McAndrew*, 44 N. Y. 88, and cases cited). But that the tendered performance should stand as a substitute for the actual, can only be maintained upon the ground that the thing agreed to be sold has been in independent existence, and, the *corpus* not being perishable or changeable, the title has so far passed that the vendor remains but the trustee of the vendee in respect to it, and on subsequent payment of the price, the *specific thing* may still be delivered over or duly accounted for to the vendee (*Shannon v. Comstock, supra*). On such a tender the vendor assumes to preserve with ordinary care the thing agreed to be conveyed ready for transfer, on compliance by the vendee with the terms of purchase (unless he chooses to exercise his right to sell under his vendor's lien), and any inconsistent use or diversion of it amounts to an abandonment of the tender. If there exists any analogy in a contract for the hire of services, where the employee has been unjustly discharged, his tender and continued offer and readiness to perform them, and his reasonable efforts to obtain other employment, or his entry in good faith into other employment, are necessary to constitute any similitude by *way of a constructive performance* and a rendition of such complete service to the purposes of the contract as it calls for on his part.

There are some questionable authorities for holding such

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constructive service equivalent to actual performance, and entitling the employee to accruing wages; but, *as in all cases of tender*, it is necessary, in order to constitute it a substitute for actual performance, that it should be maintained; as the employer has a *locus pœnitentiæ*, and in avoidance of questions of responsibility may at any time, while the tender is preserved, accept performance. In the present case, the departure of the plaintiff from the city and his absence for the eight weeks in Maryland and Virginia, engaged in his own pursuits, without notice to defendant of his whereabouts or address, or of being subject to immediate recall, was not the maintaining of any such tender, nor did it show a case of readiness at all times, during the period of the contract, to render the service for which the plaintiff had contracted. *Secondly*. In all cases of breach of contract, it becomes the *active duty* of the party injured to make reasonable exertions to render the damages resulting therefrom as light as possible. The Court of Appeals, in *Hamilton v. McPherson* (28 N. Y. 76), say: "The law for wise reasons imposes upon a party subjected to injury from a breach of contract the *active duty* of making reasonable exertions to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or wilfulness, allows the damages to be unnecessarily enhanced, the increased loss falls upon him, and he can recover nothing for damages which, by reasonable diligence on his part, could have been prevented" (p. 77). So, also, in *Dillon v. Andrews* (43 N. Y. 237), they say: "It was the duty of the plaintiff, as soon as due notice was given, to have so acted as to save the defendant from further damages, so far as was in his power." Without questioning that the burden of proof of failure in this respect was thrown upon the defendant to show by way of *recoupment*, or in mitigation of damages, the neglect of the plaintiff to make any effort to get other employment, the absence of any such effort appeared in his own testimony and was conceded. His statements in extenuation, that it *was not very easy* to procure such other employment, and he did *not think* he could have got similar employment, presented no justification for his entire

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omission to make any effort whatever. His obligation in that respect was one of *ordinary* but *active* diligence, and his conduct suggests the natural inquiry, whether, if he had been discharged for cause, he would, under the usual exigencies of life and its claims upon him, to act with diligence and caution in earning a livelihood or making his talents available and profitable, have for eight weeks abandoned every effort to secure any employment, or to earn any money in the line of his profession, and "go a-fishing?" Common sense fully answers the question. If voluntarily idle, he failed in his legal and moral duty, as the law regards such conduct "a fraud upon his employer" (*Shannon v. Comstock, supra*; *Huntington v. Ogdensburg & L. C. R. R. Co.* 33 How. 416). If intending to insist on a continuing, although constructive, performance, and a right to recover as for full compensation under the contract, he could not accept the employer's dismissal as a license to indulge in a relaxation of its requirements and go about his own business. The motion for a nonsuit made substantially on this ground, at the close of plaintiff's case, was renewed at the end of the trial, in a request to the judge to charge the jury, and substantially presented both the previous questions.

Thirdly. The plaintiff's discharge did not, as a matter of law, entitle him, on the expiration of his term of service, to recover the full price for the whole period. The defenses arising from his departure for Maryland, and his continued absence at the south; and his failure after his discharge to attend at the theater, or to apply for employment elsewhere; or to maintain any continuous offer to perform, were set up by the answer and distinctly proved. The absence of any such tender of services or readiness to perform for eight weeks after he was discharged, disentitled him from such a recovery for services rendered during that period at the contract rates, as has been awarded. There had been much question whether the employee unjustly discharged, but tendering performance, may maintain his action on the contract for accruing wages, or is confined to his single remedy for damages for the unjust dismissal. This subject has been most ably and elaborately examined by C. J. Daly in *Moody v. Leverich*, decided at the present term, *ante*, p. 401, (in which I

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concurred), sustaining the latter view of the law, and must be regarded as settling the question, so far as this court is concerned. While there may be authorities asserting more or less broadly the right of the employee illegally discharged, on maintaining tender of his services, to recover compensation from time to time as wages would become due under the provisions of the contract (see cases reviewed in *Moody v. Leverich*), none of them assume to afford such right of recovery to one who abandons the sphere of his employment and adopts other pursuits, for his own profit or pleasure.

Fourthly. Notwithstanding the want of a formal exception to the refusal of the judge to charge as requested, "that plaintiff, by leaving the city, rendered it impossible for the defendant to employ him," the facts of the case clearly show that plaintiff, by his departure and abiding at the south for the period of time shown, relinquished his employment and disentitled himself from any recovery after he left; and as the point had been previously taken on the motion to dismiss the complaint, the court on this appeal is required "to give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits" (Code, § 366). Those merits, on the pleadings and proofs in the case, in my opinion, debarred the plaintiff from the recovery of any definite sum beyond the \$18⁵⁸/₁₀₀ tendered or offered.

For these reasons the judgment should be reversed, subject to plaintiff's acceptance of that amount.

Judgment reversed.

Emmons v. Barnes.

CHARLES EMMONS v. HARVEY BARNES, IMPLEADED, &c.

Where a note is given for full value and without any agreement for usury, the fact that on a subsequent settlement usurious interest is taken does not invalidate the note.

A. applied to B. to discount his note, and B. agreed to do so, and offered him the money for it, without anything being said about usurious interest. At A.'s request only part of the money was paid him at that time, and in a subsequent settlement between them of the amount due A., illegal interest was taken by B.; *Held*, this did not invalidate the note.

APPEAL by defendant from a judgment entered on the verdict of a jury at trial term.

Action on a promissory note for \$2,500, at four months, dated December 6th, 1870, made by Lewis E. Smith & Co. to the order of the defendant Barnes, and indorsed by him for the accommodation of the makers, by whom it was transferred before maturity to one James Appleby.

The defense relied upon at the trial was usury in the discounting of the note by Appleby.

The other facts necessary to an understanding of the case are stated in the opinion.

BY THE COURT.*—JOSEPH F. DALY, J.—The note had no legal inception whatever, unless discounted in good faith by Appleby for the makers for its full value before maturity. There was no evidence to show that Appleby had any notice or knowledge of any special or limited purpose in defendant's endorsement, or that he was not a holder in good faith. The facts as to the discounting of the note were these: On December 15th (nine days after the date of the note) Smith brought it to Appleby, handed it to him and stated that he

* Present LOEW, LARREMORE and J. F. DALY, JJ.

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wanted money on the note; Appleby told him he could have it; that the note was good with Barnes' name on the back of it, asked Smith if he wanted the money for the whole of it, and offered Smith all the money at the time he handed him the note, but Smith told him he preferred to call for it as he wanted it. At that time Appleby gave Smith \$300 in cash, and Smith also receipted for \$312 more, being the amount of an old debt then actually due from him to Appleby, making in all \$612. On December 16th, Appleby gave Smith \$50; on January 4th, 1871, \$169 01 and \$50; on February 3d, \$369 52, which included an allowance of \$58 43, computed as interest on the note for 4 months; on March 4th, \$540 69, and on April 1st, \$361 60, making in all \$2,152 82 advanced by Appleby to Smith on the note, the balance being at the date of the trial still due to Smith. The ground of the alleged usury is this: on February 3d, \$58 43 was allowed Appleby by Smith, as above stated, for interest on the money advanced upon discounting the note, but such interest instead of being computed from December 15, the day of the discounting, was computed from December 6th, 1870, the date of the note, Appleby receiving thereby \$4 32 of interest more than he was entitled to by law. But in my opinion this was not an usurious agreement under the statute which avoids the note. The agreement for the discount of the note upon its delivery to Appleby was made between Appleby and Smith on December 15th, 1870, on which occasion Appleby offered to give the whole amount and nothing whatever was said about reserving interest. Smith preferred to call for the money as he wanted it instead of taking the whole amount at that time, and on that day received in cash and by satisfaction of his old debt \$612. The transaction was complete on that day and the title to the note passed to Appleby as completely as if a check for the whole sum had been given by him. He could have transferred it to a *bona fide* holder who could have recovered on it its face, because the agreement upon which it had been discounted by Appleby was wholly untainted by any usurious agreement whatever. After that date Appleby had only to pay Smith's demands from time

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to time, as he did, until the full amount was advanced. The arrangement of February 3d, 1870, nearly two months afterwards, by which Smith allowed and Appleby received \$4 32 of interest more than he was entitled to, could not affect the agreement upon which the note was originally transferred. It had no *ex post facto* effect to render invalid a perfectly legal transaction (*Woodruff v. Hurson*, 32 Barb. 557; *Carson v. Ingalls*, 33 Id. 657; *Lesley v. Johnson*, 41 Id. 359; *Williams v. Fitzhugh*, 44 Id. 321).

The \$4 32 excessive interest was given by Smith to Appleby because the latter had not charged interest on the old debt which had been paid off at the time of discounting the note; so Smith states. The appellant is correct in claiming that the old debt had been extinguished, and the right to interest with it, and that there could be no settlement of accounts between the parties in respect of it, and also that there was no taking of less interest than Appleby was at that time entitled to; but even if the \$4 32 were a voluntary gift or present from Smith to Appleby, it would not (under the decision in *Woodruff v. Hurson*, *supra*) affect the note if the agreement for discount were not in any way connected with it, and it appears conclusively from the evidence that the arrangement for interest on February 3d was an after-thought, and wholly unconnected with the discounting on the preceding 15th of December.

The exceptions to the judge's charge relate wholly to supposed misdirections on the subject of usury, and as there was no evidence tending to establish usury, such exceptions were unavailable. Besides, the exceptions were taken to portions of the charge involving extended comments on the evidence, and not to isolated propositions of law or refusals to charge distinct propositions, but were general in form, and did not specify and point out to the court in what respect defendant's counsel deemed it had erred (*Walsh v. Kelly*, 40 N. Y. 556; *Requa v. City of Rochester*, 45 N. Y. 129).

Had the merits of the controversy been presented on a case, and claim made for a partial reduction of the recovery, some abatement of the verdict to the extent of the pre-existing debt,

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or the excess of interest, or the deficiency between the amount of advances and the face of the note, might have been granted ; but no suggestion of error is made in this respect, nor is any such relief claimed.

The judgment should be affirmed.

Judgment affirmed.

FREDERICK W. BECK *et al.* v. MICHAEL ALLISON.

A covenant in a lease to repair will, in a proper case, be specifically enforced in equity. The cases in which the contrary is expressed, shown to have been loosely determined, without due examination of the authorities.

What is to be done under the covenant, however, must be clear, definite, and certain, for if it be extensive, involving too many details, which demand the consideration of the particular circumstances and the exercise of judgment, as well as a long time for its performance, the party will, unless the equities are very strong, be left to his remedy in an action for damages. This branch of equitable jurisdiction is the exercise of a discretion which depends upon the facts and circumstances of each particular case.

If the contract was just and fair when entered into, events afterwards occurring, which are not so involved in it that they must have been in the minds of the parties when the contract was made, cannot be invoked to show the hardship of and to excuse performance, unless they were in some way due to the party who applies for the specific performance. They may be taken into consideration, however, where the court can, instead of decreeing a specific performance, make a more equitable disposition of the whole matter.

If the plaintiff knew, when he brought his suit, that the defendant could not perform, either from his having conveyed the property to another, or from any other cause, the complaint must be dismissed, the plaintiff's remedy being an action for damages, which is not only an adequate, but his sole remedy ; the defendant in that case being entitled as matter of right to a trial by jury.

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But where it is averred in the complaint, and appears from the facts set forth in it, that the defendant can and ought to perform, the jurisdiction in equity attaches, the defendant is put to his answer, and the case comes before the court upon the issue and the proofs for its equitable consideration. If it then appear, upon the defendant's showing that he has disabled himself from performing, and in doing so acted inequitably, the court may decree to the plaintiff a compensation in money, to be ascertained by some equitable rule, or by a trial by jury; because the plaintiff, being ignorant when he brought his suit of the defendant's disability, had a right to bring it; and jurisdiction having attached by the institution of a suit justly and properly brought, it may be made effectual for the purpose of administering complete relief.

The cases reviewed relating to the right of a court of equity, where it refuses a specific performance, to amend a compensation in damages; their conflict with each other considered, and the rule deducible from them laid down.

If jurisdiction in equity attaches, as where performance is not impossible, but exceedingly onerous, the court is not bound to decree a specific performance, if it can, by adapting the remedy to the special circumstances of the particular case, make a more equitable adjustment of the whole matter. Thus, where the covenant on the part of the landlord, in a lease of some years' standing, was, that he would repair all damages to the building occasioned by a fire, and the building was so damaged by a fire that it could not, under the fire laws, be repaired from the old foundations, and the erection of a new structure became necessary; the court took into consideration that the building was very old, that it was unsuited to the locality where it was, being neither of the style, size, or strength required for the business usually carried on there; that it would—the lease then having but three years more to run—subject the landlord to great loss and injury to compel him, in fulfillment of the covenant, to re-erect such a building as the one destroyed,—the tenant refusing, if a building were erected suitable to the locality, to pay any more rent for the remaining three years than he had previously paid, and insisting upon a strict fulfillment of the covenant,—and, in view of these circumstances, refused to enforce the specific performance of the covenant, but adjudged instead that the landlord should pay to the tenant the estimated excess of the value of the lease to him for the remaining three years over the rent he was to pay, which was ascertained and fixed by the court upon the trial, from evidence before it.

A covenant, as respects its future performance, when the contingency arises which calls for its fulfillment, will be construed with reference to a public law or regulation enacted after the covenant was entered into, if the law or public regulation in any way affects it.

APPEAL by defendant from a judgment entered on the decision of a judge at special term.

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The action was brought by the plaintiffs, assignees of a lease of a building owned by the defendant, which had been injured by fire, to compel the specific performance of a covenant in the lease, to repair all damages caused by fire.

The judge who heard the case at special term found that defendant had covenanted to repair it as alleged in the complaint, and had failed to perform, but declared that in the exercise of a sound discretion he should not be adjudged to perform specifically, but that the plaintiffs were entitled to damages for non-performance, which he assessed at \$2,366 68, and that the lease held by plaintiffs should be surrendered and canceled. The other facts necessary to an understanding of the case are stated in the opinion.

Andrew Boardman, for appellant.

I. It would be highly inexpedient and dangerous for the court to turn builder of houses, make contracts, buy materials, employ and superintend workmen, devise plans and take charge and management of the defendants' affairs, and what it will not appoint a receiver to do, it surely will not authorize the plaintiff to do (*City of London v. Nash*, 3 Atk. 512; *Errington v. Aynesley*, 2 Bro. Ch. R. 343; *Lucas v. Comerford*, 3 Bro. Ch. 167; *Flint v. Brandon*, 8 Ves. 163; *Raynor v. Stone*, 2 Eden, 128; *Hill v. Barclay*, 16 Ves. 405; *Harris v. Jones*, 1 Moo. & Rob. 173).

II. There is nothing in the complaint to show that the plaintiffs had not a complete and adequate remedy at law. Equity does not interfere except in case of strong and imperious necessity, or in case where a suit at law would not afford to the plaintiff ample relief (*Olmstead v. Loomis*, 6 Barb. 160–165; *Redfield v. Middleton*, 7 Bosw. 649; *Van Bergen v. Van Bergen*, 3 John. Ch. R. 232; *Reed v. Gifford*, 6 Id. 19).

III. The Court having rightly decided that the plaintiff had not the right to the relief he demanded, should have dismissed the complaint with costs. The defendant, when the question

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resolved itself into purely one of damages, had the right to a trial by jury.

W. W. Macfarland, for respondents.

I. Covenants to improve and repair are among those covenants of which a specific performance will be decreed in proper cases (*Stuyvesant v. Mayor of N. Y.*, 11 Paige, 414; Fry on Specific Performance, 66, side p'g 30; *Denton v. Stewart*, 1 Cox, 258).

Since the case of *Denton v. Stewart* (1 Cox, 258), it has been the constant practice in courts of chancery, both in England and in this country, in *a certain class of cases*, to retain the bill and give damages in cases where a decree for specific performance was denied. Touching the power of a court of equity to decree damages or compensation in cases where specific performance could not be decreed, it is true there has been much controversy. It is equally true that this controversy, particularly in this country, has been confined to the class of cases where, at the time of filing the bill, specific performance had, for some cause, become impossible. So that, in substance, the bill was not a bill for specific performance, that having become impossible, but for damages for the non-performance of a contract, and constituting a plain ground for legal, but not equitable, relief, and, therefore, *no jurisdiction in equity existed at any stage of the cause*.

No serious doubt has ever been expressed or acted upon in any case where the cause came within the jurisdiction of the court; and it became a matter of sound discretion, under established rules, whether the court would decree performance or give damages or performance in part, or damages as to the residue. In short, if jurisdiction attached for any purpose, no question existed as to the power of the court on the question of damages.

The broad doctrine of *Denton v. Stewart* was followed by Chancellor Kent in *Phillips v. Thompson* (1 John. Ch. 150), and *Parkhurst v. Van Cortlandt* (1 John. Ch. 286).

In *Hatch v. Cobb* (4 John. Ch. 560), the chancellor takes the distinction referred to, and says, "It is doubtful how far the court has jurisdiction to assess damages merely in such a case, *in which the plaintiff was aware when he filed the bill that the contract could not be specifically performed or decreed.*"

The same view is expressed in *Kempshall v. Stone* (5 John. Ch. 194, 195).

In *Woodcock v. Bennet* (1 Cowen, 711), the general jurisdiction was affirmed.

The Supreme Court of the United States, in *Pratt v. Law* (9 Cranch, 492, 494), exercised this jurisdiction without doubt or hesitation.

The same is true of the Supreme Court of Mass.; *Andrews v. Brown* (3 Cush. 134), where the question is very fully discussed.

In England the question has been set at rest by Sir Hugh Cairnes' act, 1858, defining in what cases the court may give relief by way of damages.

But, to conclude, there never was any doubt as to the power of the court in the premises where jurisdiction attached, and they were given in lieu of specific performance or other equitable relief, or as incidental to and in connection with other relief.

II. In the case at bar, the court clearly had power to grant a specific performance. Moreover, the court having decided not to grant a decree for specific performance, the tenancy was at an end before the expiration of the term of the lease, and a disposition of the whole matter in controversy required that the lease should be delivered up and canceled. It was, therefore, necessary for the court to hold the bill for this equitable relief. And as the court never deals with a subject-matter by piecemeal, but, if at all, in such a manner as to settle all questions and put an end to the controversy, it was plainly in accordance with established principles to ascertain and decree the payment of the damages.

The judgment would stand, therefore, independent of the Code.

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III. Since the Code, such a question as we have been discussing can hardly arise. Legal and equitable jurisdiction has been concentrated in one and the same tribunal, and all distinctions in the forms of pleading abolished.

The only distinction remaining relates to the *mode of trial*, and the processes of enforcing judgment.

The only distinction applicable to the class of cases under discussion relates to the mode of trial.

And, if we assume that in every case where the court refused to grant the strictly equitable relief prayed for, and yet the case appeared to be a proper one for damages, the court would be bound, on the motion of the defendant, to send down an issue to be tried by the jury, or send the case to the circuit for that purpose; it is, nevertheless, plain that trial by jury may be waived, and is waived by an omission to make this motion and raise this objection, and in such case a trial by the court is lawful and proper.

In the case at bar, for the reasons before stated, it is submitted that no objection to the mode of trial could have been well taken. But, however this may be, no such objection appears in the case, and hence the case is in all respects governed by *Greason v. Keteltas* (17 N. Y. 491), and *Barlow v. Scott* (24 N. Y. 40).

BY THE COURT.*—DALY, CH. J.—This case was an action for equitable relief, and it is so complicated, both as respects the facts and the questions that arise upon them, that it will be necessary to a clear understanding of the points that we have to pass upon to ascertain from the pleadings the exact nature of the case which the plaintiffs presented in their complaint, and the defense which the defendant set up to it, by his answer.

The plaintiffs set forth that they are the equitable assignees of a lease of a house and lot in Vesey street in this city, which

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ.

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the defendant in 1864 demised for the term of two years to certain persons, who assigned the lease to one of the plaintiffs, Frederick S. Beck, he subsequently agreeing with the other plaintiffs, who are his partners in business, to hold the lease for his and their benefit; by the provisions of which lease he, Beck, became entitled to a renewal for the further term of three years from the 10th of May, 1866. The lease contained the following clause or covenant: "and all repairs and improvements, including the painting of the front and the roof, and all that they may require to be done to the said premises, damages by fire excepted, are to be repaired by the party of the first part (the lessees), and to pay the said rent of \$2,800 each and every of the above mentioned years, &c." The words, "damages by fire excepted," and "to be repaired by the party of the first part," were interlined in the lease, after it had been filled up and before its execution, to give effect to the agreement then made between the defendant and the lessees, that all damages occasioned by the fire should be repaired by the defendant, it having been agreed that the lessees should pay for all other repairs and improvements which they might require.

The plaintiffs, after they came into possession of the premises, expended a large amount of money in making improvements, in erecting an engine house thereupon and in setting up a steam engine to drive the machinery used in their business; and whilst they were thus in possession, a fire occurred on the premises on the 31st of March, 1866, by which the buildings were greatly damaged and injured, so that extensive repairs became necessary to render the premises tenantable and enable the plaintiffs to carry on their business.

The complaint then recites that the plaintiffs repeatedly called upon the defendant to repair the building, which he wholly neglected to do, putting the plaintiffs off with various excuses, and demanded the rent, without disclosing what he intended to do. That the plaintiffs gave him notice that if he did not proceed with the repairs, an action would be commenced against him to authorize the plaintiffs to expend the accruing rent in making the repairs, and to restrain him in the

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meanwhile from collecting the rent. That an interview took place in consequence of this notice between the attorneys of the respective parties, the result of which was, as the plaintiffs understood it, that the defendant claimed to be ready to take one of two courses: to repair the damages and reinstate the premises in their former condition, or to put up a different and more expensive building, of which the plaintiffs might take a lease at an enhanced rent, surrendering the existing lease for a sum to be named by them as a compensation for the value of their unexpired term. That they accordingly named the sum and offered to surrender the existing lease, but that no answer was returned by the defendant. That in place thereof, he sent them a note, demanding the payment of the rent up to the 1st of May, 1866, and threatening that if it was not paid, he would take legal measures to dispossess them of the premises for the non-payment of it.

That all that the defendant did after the fire was to employ a few men to take down a part of the walls, which were considered dangerous as they stood. That without indicating what he would do himself under the covenant, he applied to the plaintiffs upon several occasions to know what they would do about the lease, and stated to them that it would be much better for him to take down the building and erect a more modern one in a better style, which would command a better rent, and asked if he did so, if they would be willing to pay a higher rent; but the plaintiffs declined to enter into any such arrangements, and as during two-thirds of the time that had elapsed from the happening of the fire, nothing had been done, and as no materials had been brought to the premises for repairing the building, the plaintiffs, after nearly two months had elapsed from the time of the fire, commenced this suit to compel the defendant to perform his covenant to repair. The equitable relief asked for in the complaint was, that the defendant should be adjudged to perform his covenant; that the plaintiffs might be authorized to expend the rent accruing under the lease in repairing the damages occasioned by the fire; that the defendant might in the meanwhile be restrained from taking any proceed-

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ings to enforce the payment of the rent, or to disturb the plaintiffs' possession; and that a receiver should be appointed, to whom the plaintiffs could pay the rent, that it might be applied towards the making of the repairs, and that such repairs should be made under the direction of the receiver, if the defendant neglected to proceed with due diligence to make them; that is, as I infer, if he should not proceed after the court had decreed the specific performance of the contract.

The defendant, in his answer, admits that the provision referred to was incorporated in the lease to relieve the lessees from the obligation they would otherwise be under to repair the premises in case of fire, but claims that the repairs intended to be provided for by this clause were such as might arise from a slight or moderate damage by fire, and not such as are required when a building is so damaged by the fire as to become untenable; in respect to which, it is sufficient to say, that there is no such distinction in the covenant, nor can it, by any construction, be grafted upon it. If the court should be of the opinion that the covenant is not susceptible of such a construction, then the defendant asks the equitable aid of the court to correct the covenant, so that it may conform to the actual agreement and intention of the parties; but upon this point the judge below has found against him. He finds that the words "damages by fire excepted," interlined in the lease, do, in the connection in which they stand, truly express the agreement of the parties, and that no mistake was made in so inserting them. No evidence was given upon the trial by the defendant, of any such agreement or understanding. After he had closed his case, and was entitled only to give evidence in rebuttal, he asked a witness this question: "How came that interlineation in the lease?" to which the plaintiffs objected, as presenting the case in a new aspect, and the judge excluded any further testimony on this point, which, in that stage of the case, was a matter of discretion on the part of the judge, which is not reviewable.

The answer of the defendant further avers that there has been no want of diligence on his part; that the state of the

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adjoining and party wall, and the measures necessary in respect to it, and in shoring up the walls before they could be taken down with safety, caused a delay, which was increased by the plaintiffs' employing the defendant's workmen to get their iron safe from out of the ruins; that no materials were brought to repair the building, as they would have impeded the other operations; that from the time of the fire, he proceeded in good faith and with due diligence to repair the building. He denies any intention of delaying the restoration of the building, or any purpose of keeping up a show of intending to repair, or of wearying out the plaintiffs; but avers that, on the contrary, he used diligence, and did all that it was possible for him to do to restore the building. He avers that the plaintiffs never notified him to repair until May 7th, which was about two weeks before the bringing of the suit; that on the 3d of May he called upon the plaintiffs to pay the rent up to the 1st of May, and that they replied that they would not pay any rent for the premises beyond the time of the fire; that he then offered to accept the proportionate part of the rent up to the time of the fire, in full of the plaintiffs' liability, if they would cancel the lease, which they refused, and he claims that their refusal to pay any rent accruing after the fire was an election on their part to exercise their right, under the statute, to cancel the lease, and give up the premises, the premises being untenable after the fire; that he offered to sell them the premises at a price proposed by him, which they took time to consider, and in a few days afterwards declined to purchase; that he then offered to put up a larger building, giving them increased accommodation, which they wanted, if they would pay a larger rent, and that they took this proposal into consideration, and promised to advise him of their decision, but never did so; that a person applied to him for a lease of the premises, provided he erected a new building, the applicant stating that perhaps the defendant could buy the plaintiffs out; that his counsel had an interview, in consequence of this application, with the plaintiffs' counsel, and that he received from the plaintiffs' counsel an offer on the plaintiffs' part to sell out

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for \$5,000, which the defendant considered unconscionable, and as a proof that the plaintiffs were not acting fairly, but were bent upon making the most of the embarrassing circumstances in which the defendant was placed. He admits that the letter received by the plaintiffs demanding rent, and threatening proceedings if not paid, was sent by him, which he did, he says, upon being advised that a written demand of the rent was necessary after the plaintiffs' assumption of the continuance of the tenancy, and he avers that the note requesting the names of the members of plaintiffs' firm (which had reference to his alleged threat to dispossess the plaintiffs) was not written by the direction or knowledge of the defendant's counsel, but by a clerk in the counsel's office; the answer closing with a general denial of everything in the plaintiffs' complaint not specifically admitted.

Assuming, as we must from the judges' finding and the evidence, that the defendant was bound by the covenant to repair the building after the fire and to put it in a tenantable condition; the further issues tendered by the defendant's answer, with the evidence under them, and the finding of the court, I shall now proceed to consider. They may be summarily stated as follows: 1. That the refusal of the plaintiffs to pay rent for the time beyond the fire, was on their part an election under the statute of 1860 to quit and surrender the premises (4 Edm. Rev. Stat. p. 433). 2. That the plaintiffs did not notify the defendant to repair until the 7th of May, thirty-seven days after the fire. 3. That the delay was owing to the necessary propping up of the walls after the fire, their condition being such as to make it dangerous without this to work upon the premises; to the employment by the plaintiffs of the defendant's workmen to get out their safe, and to the negotiation between the plaintiffs and the defendant in respect to the purchase by the plaintiffs of the premises on the putting up of a larger and different structure at an enhanced rent; all of which may be embraced under the general averment in the answer, that the defendant after the fire proceeded in good faith and with due diligence to repair, and did all that it was possible for him to do to restore the building.

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The judge has found that the plaintiffs did not refuse to pay rent for the time after the fire, except upon the ground of the defendant's neglect to proceed with the repairs, and of their right to retain the rent towards indemnifying them for the damage they suffered by the delay. This finding is fully sustained by the evidence. When Beck gave the defendant a check for the rent up to the time of the fire, the defendant said, "Then you surrender the premises," and Beck answered, "No, I do not." The defendant then said, "I want more unless you surrender the building." Beck replied that he would not do any such thing, that at that time he would not pay any more, because the defendant had not been doing anything towards the repair of the building; that he had not done a thing, nor turned a stone towards repairing it. This was on the 3d of May. On the 5th of May the defendant called again, and demanded the quarter's rent, to which Beck answered that he would not give him any more than he had previously offered. The defendant then asked him if he refused to pay the rent, and Beck answered, "Yes, at present I do, until I see what you are going to do." The defendant then took the check for the rent up to the time of the fire, and as he was leaving, Beck asked "what he was going to do," and the defendant answered, that he was "going to repair." This evidence fully warrants the judge's finding, and entirely disposes of this ground of defense.

In respect to the averment that the plaintiffs did not notify the defendant to repair until the 7th of May, the testimony of the plaintiff Beck was, that he had an interview with the defendant three or four days after the fire, and told him that he was very anxious that the building should be put up as soon as possible. That upon another occasion the defendant told him that he would like to put up another building, and that Beck replied that was of no consequence to the plaintiffs, that all he wanted was to get the building put up as it was. That he saw the defendant five or six times, and that the substance of their conversation was all about the repair of the building; that he urged the defendant to go ahead at once, and that the substance of the defendant's replies was, that he wanted to see his brother

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(his brother being the owner of the adjoining building, which was also greatly damaged by the same fire); that he could not bring things together; that he was contracting to see what the amount would be, and what the new store would cost; what the difference was between the price of one contractor and the price of another, and stated that there was a difference of \$2,500 between the price of one contractor and the price of another; that the impressions he conveyed in these conversations was, that he was "going ahead to do something with the building, and the reason it had not been done was, that he had been delayed for various reasons;" evidence which wholly disproved the defendant's alleged want of notice until the 7th of May, and fully sustained the plaintiffs' averments.

The judge found that the defendant did not proceed with due diligence after the fire in making the repairs, and was not proceeding with due diligence when the action was brought, and this finding is supported by the evidence. It is manifest from the perusal of the testimony, that the defendant had not determined when the suit was brought what he intended to do; whether he would restore the building to the condition in which it was, as far as the fire laws would allow him to do so, or put up a new structure; or if he had, he kept his intention to himself. The building upon the adjoining lot, which was connected with his own by a party wall, belonged to his brother, and the party wall was so damaged by the fire that a part of it was dangerous and had to be shored up to enable the workmen to take it down. Between four and eight days after the fire, his brother informed him that he intended to put up a good substantial store upon his own lot; that he intended to build it as soon as he could, that he was going to build it in the modern style and to make it as substantial as he could. The architect testified, that in the erection of the building of the defendant's brother, they could not take the party wall down separately on the defendant's brother's lot, but that the whole had to come down together; that the wall was taken down as soon as it could be done prudently and carefully; that on the 10th of May he asked the defendant's permission to build a new party wall, notifying him that if he did not

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comply it would be pulled down, and that he gave his consent.

What the defendant manifestly wanted was to get rid of the obligation of complying with the covenants in the lease if he could. He therefore wanted the plaintiffs to purchase the premises. The plaintiff Beck's account of what occurred upon that subject is very different from the defendant's testimony, or from what was set up in the defendant's answer. Beck says that the defendant told him that he did not know what to do; that he would like to sell the premises, as he was building in the country, and asked him to purchase; that he told the defendant that the plaintiffs were not in a condition to purchase; that he, Beck, had property in Baltimore, and that all the money the plaintiffs had was locked up in it; that it was a matter he could not decide alone; that he would see his partners, but that he, Beck, had no idea of purchasing. A week after the fire the defendant spoke to Beck about putting up a larger building. Either upon that or some other occasion, he talked about putting up a different kind of building, but that it would require the payment of more rent, and the plaintiffs told him that all they wanted was to have the building put back in its original state, but as to paying more rent, they could not think of that. In this respect there is a conflict between the defendant's and Beck's testimony; but upon the judge's finding, we must assume that where they differed as they did in this instance, he gave greater weight to Beck's testimony.

That the defendant was anxious to get rid of the lease, appears from his own testimony. He says that when Beck replied that the amount offered was the rent up to the time of the fire, he, the defendant, said, "Then you cancel your lease, and I accept it;" and that when Beck said "No," the defendant laid the check for the amount offered down, and said he would not accept it on any other conditions. He testified that he never made any written contract with anybody for restoring the building to the condition in which it was before the fire; that he procured specifications of the work to be done for restoring it to its original condition, but never made any contract for any material for restoring it, and did not purchase

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any, and his inaction in this respect extended from the time of the fire to the commencement of the suit, a period of nearly two months. Finally, the letters which passed between the plaintiffs' and the defendant's counsel on the 5th and 8th of May show that the delay was intentional; that, as the plaintiffs aver in their complaint, the defendant's "aim and object was to keep up a show of intending to make the repairs;" the taking down of the party wall and the front wall having become necessary in consequence of his brother's determination to build a new and higher structure on his lot, whilst the clearing up of the ruins, and the cleaning of the old brick, which, with the previous temporary shoring, was all that was done in addition, was essential, whether he should finally determine to erect a new and larger structure, like his brother's, or restore the building, under the covenant, to the condition in which it was, as far as the existing fire laws would permit. Though he said, when he accepted, on the fifth of May, the rent up to the time of the fire, that he was "going to repair," it is, I think, evident from all that previously took place, and from this correspondence, that he had not in fact determined to repair under the covenant, and meant, as before suggested, to get rid of the obligation, in some way, if he could. The letter of the plaintiffs' attorneys of the 5th of May to the defendant, after stating that the premises were damaged by fire so as to require extensive repairs, says, "Although frequently applied to for that purpose, you have not commenced the same, as you are bound to do by your lease; but you nevertheless have demanded payment of the rent up to the 1st inst.," and then advises him that in case of his continued omission to proceed with the repairs, an action will be commenced against him for the purpose of obtaining a judgment, authorizing the plaintiff to expend the accruing rents in the repairs, and for an injunction to restrain him from interfering with their possession, or collecting the rents in the meanwhile. To the letter the defendant's attorneys replied on the 7th of May following. They say that they are instructed by the defendant to state that the plaintiffs have not at any time applied to him to repair, but that, nevertheless, he is proceeding with diligence

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to make the repairs, although *the duty of making them, by the terms of the lease, devolves upon the plaintiffs*; and after stating what the defendant had done after the fire, and the cause of the delay that had occurred, the letter adds, "We beg to call your attention to the fact that your clients (the plaintiffs) refuse to pay rent for the premises, yet decline to surrender them. We suppose that you cannot both hold the premises, and refuse to pay rent for them;" and ends with a suggestion of coming to an arrangement which would do justice to all parties. This letter takes the ground that the obligation to repair the premises was upon the plaintiffs, and not upon the defendant, and that it was incumbent upon them either to pay the rent, or surrender the premises, showing unmistakably what the defendant's position then was; and this state of things continued down to the commencement of the suit. As I have said, the whole of this evidence fully sustains the judge's finding.

Before the plaintiffs called their witnesses, the defendant moved to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. Beyond this, the specific grounds of this objection do not appear in the case as settled; but upon the argument of this appeal, we are referred to the cases of *Errington v. Aynesly* (2 Bro. Ch. R. 343; 2 Dick. 692); *Lucas v. Comerford* (3 Bro. Ch. 166; 1 Ves. J. 235); *Raynor v. Stone* (8 Eden, 128); *Flint v. Brandon* (8 Ves. 163); and *Hill v. Barclay* (16 Ves. 405), as authorities for the proposition that a court of equity cannot and will not decree the specific performance of a contract to repair. In the first of these cases the plaintiff relied upon evidence on his part to show that a bridge could have been built on the foundation that would have stood, and insisted that if he had filed a bill for the purpose, he could, in equity, have compelled the plaintiff to execute the contract. To this, Lord Kenyon, Master of the Rolls, said, that he never knew a bill for the specific performance of a contract of that sort; that there was no case in which the specific performance was decreed of an agreement to build a house, in which, as will hereafter be shown, he was mistaken. He accordingly relieved against the bond, and directed an issue *quantum damnificatus*.

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In the next case, *Lucas v. Comerford*, Lord Thurlow was asked to decree the specific performance of a covenant in a lease to rebuild. He refused to do so. The plaintiff cited *The City of London v. Nash* (1 Ves. Sr. 12), in which Lord Hardwicke held that a contract to build a house might be enforced in equity, but Lord Thurlow replied that he was not inclined to follow that precedent of building a house under the direction of the court, any more than of repairing one. If the point rested upon the weight of Lord Thurlow's opinion, as opposed to that of Lord Hardwicke, who was not only a great common-law lawyer, but the ablest equity judge that ever sat in the Court of Chancery, there could be little question as to whether he should be followed, or Thurlow, whose general habit was to decide causes off-hand, without examining authorities—a chancellor, who, in the language of Lord Campbell, “dealt recklessly with the rights he had to determine, and who did little in settling controverted questions or establishing general principles.”—*Lives of the Chancellors*, vol. 5, p. 521.

But it is not necessary to rest upon the authority of Lord Hardwicke, for the jurisdiction in equity, to compel the specific performance of a contract to build or repair, was recognized at a very early period. In an anonymous case in the Year Books, 8 Edw. IV, 4, Genny is put down as saying, “If I promise to build you a house, and I do not do it, you have your remedy by a subpcena in chancery,” to which Stillington, the Lord Chancellor, assented. In a later case, 27 Hen. VII, 41, Fineux, Chief Justice, said, “If a man covenants to build a house for me by a certain day, and does not do it by that day, I shall have my action on the case for the nonfeasance; and so if he does it ill, I may sue him for damages;” which, says the report, he held to be the law. The report then proceeds, “If a man makes a bargain with me that I shall have his land to me and my heirs for £20, and that he will convey it to me if I pay him the £20, and he will not convey it according to the covenant, I have an action on the case, and need not sue out a subpcena (in chancery).” This case has been supposed to be authority for the proposition that the only remedy for the breach of an agreement to build, or to convey land, is by an

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action at law for the recovery of damages; for at an early period the chancellor used to send for the judges to know when equity should, and when it should not, be admitted against the common law (*per* Doddridge and Chamberlaine, in *Hudson v. Middleton*, 2 Rolls R. 433); and that the action at law ought to be the only remedy was the opinion of some of the judges in *Bromage v. Germing* (1 Rolls R. 368); but they admitted that the jurisdiction was exercised in the Court of Chancery; but prohibited an inferior court from resorting to it, and in *Molineaux Case* (Latch, 172), it was urged that it was the ordinary course, in a court of equity; and Jones, J., said, though it be so in the Court of Chancery, yet it shall not be suffered in the Court of Requests. I suppose the true interpretation of this case, from the Year Books (21 Hen. VII, 41), to be, that the plaintiff need not sue in chancery, as he may resort to his action at law to recover damages; not that he cannot, in such a case, apply in equity for the specific performance of the contract; for the jurisdiction in equity, to compel the specific performance of agreements, was long before this recognized and acted upon (Cal. ii, 2 temp. Rich. II; *Scales v. Felbrigge* (Ibid. pp. 26, 27), temp. Hen. VI; Year Books (5 Edw. IV, 14); 7 Ibid. 14; 8 Ibid. 4; 11 Ibid. 8; 21 Ibid. 23; 11 Hen. IV, 33; 37 Hen. VI, 6, 36; 10 Hen. VII, 4, 5; Fitzherbert's Abridgement, Subpœna, 19; Brooke's Abridgement, Conscience, 14, 25; Choyce Cases in Chancery (*King v. Raydon*), 43; *Wood v. Tirrell*, Cary R. 84; *Pope v. Mason*; *Bates v. Heard*; and *Throckmorton v. Throckmorton*; Tothill R. pp. 3, 4; Doctor and Student, 2 Dialogue, c. 21).

That the construction I have put upon this case is the correct one, will appear from the fact that Brooke, when incorporating it in his abridgment, was careful to add: "But by this remedy he would get nothing but damages; but by subpœna the chancellor could compel him to convey the estate, or imprison him, as it is said" (Brooke's Abr. Action Sur le Case, 72).

In *Wood v. Tirrell* (Cary R. 84, 19 Eliz.), the landlord covenanted with the tenant to build and repair a house by a certain day, and declared that he was prepared to do it, but that

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the tenant would not let him, in order to cause him to break his covenant, and to free himself from his own covenant to keep the building in repair. The defendant demurred, upon the ground that the plaintiff had his remedy at law; but the court overruled the demurrer and put the defendant to his answer. Spence refers to a case (*Kempe v. Fitch*, 7 and 8 Eliz. fol. 340) where an injunction was issued to enforce performance and viewers appointed to see to the proper completion of the work (1 Eq. Jur. 647). In *Holt v. Holt* (2 Vern. 322), a bill was filed by the heir to compel the administratrix to specially perform an agreement of the intestate to build a house, and performance was decreed. In *Allen v. Harding* (2 Eq. Ab. 17), the bill was to compel a curate to perform an agreement made with the plaintiff to build a house upon the glebe land. It was objected that the contract was too uncertain, as it did not mention when it was to be erected, or what kind of a house was to be built, and that the only remedy therefor was an action for damages. Lord Chancellor Cowper, however, said that the contract was for the benefit of the church, and that if it could be performed it ought to be, and he accordingly decreed that a convenient house should be built, and that each side should appoint two commissioners, and if they could not agree, that resort should be had to the ordinary of the diocese.

In the case before Lord Hardwicke (*City of London v. Nash*, *supra*), the defendant insisted that the plaintiffs ought to be left to their action at law, upon which Lord Hardwicke said: "The objection will not hold, for upon a covenant to build, the plaintiffs are clearly entitled to come into this court for a specific performance; otherwise on a covenant to repair; for to build is one entire single thing." In *Pembroke v. Thorpe* (3 Swans. 437, note), a part of the relief asked was to compel the defendant to perform an oral agreement to pull down an old house and build as good a one in its place. The same objection was taken that the plaintiff had his remedy at law by an action to recover damages for the breach of his agreement. But Lord Hardwicke said: "This court only compels him to perform his own agreement, which he entered into for a valuable consideration, and it would be suffering him to take advantage of his

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own wrong if he were not compelled ;” and a part of the decree was that the defendant should build a new house. Again, in *Rook v. Worth* (1 Ves. Sr.), Lord Hardwicke recognized the right of a court of equity to compel what was asked for in the present action—the rebuilding of a house destroyed by fire. He said that if the tenant in tail mixed the money with his other personal estate, without appropriation to the purpose of rebuilding, that the issue in tail might come into a court of equity to have it so applied ; and that if a house destroyed by fire was insured, and the tenant in tail died before the insurance money was paid, the issue in tail would have a right to apply in equity to have the premises destroyed repaired or rebuilt ; or that where a tenant in fee had contracted to build a house and died, a court of equity would, as between the executor and the heir, decree that the agreement be carried into execution.

In *Mosely v. Virgin* (3 Ves. Sr.), the bill was to compel the performance of an agreement to lay out a certain sum of money in building, and the conflicting decisions of Lords Hardwicke, Kenyon, and Thurlow were cited by the respective counsel. Lord Roslyn referred to the case I have cited from the *Equity Cases Abridged* (*Allen v. Harding*), respecting the building of a house upon the glebe land, as unsatisfactory, being a loose note from a book of reports, most of the cases in which, he said, were inaccurate ; and in respect to Lord Thurlow’s decision, that contracts to build were too uncertain to be enforced in equity, he made this very proper distinction : “ If the transaction and agreement is in its nature defined, perhaps there would not be much difficulty to decree specific performance ; but if it is loose and undefined, and it is not expressed distinctly what the building is, so that the court could describe it as a subject for the report of the master, the jurisdiction could not apply ; ” and this distinction has been approved by the Court of Appeals in this State in *Lobdell v. Lobdell* (36 N. Y. 330), the judge who delivered the opinion of the court declaring that specific performance of contracts will not be enforced unless the contract is clear, definite, and certain ; for if it be uncertain, so that the court cannot say what its precise import or limitations are, specific performance will be withheld. It is in accordance

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with this view that it has been held, both in this country and in England, that the specific performance of a contract to build a railroad will not be enforced in equity, such a work being too extensive in its character, involving too many details demanding the exercise of judgment and the consideration of the particular circumstances, as well as requiring too long a time for its performance, to be conducted under the orders and decrees of a court of equity (*South Wales Railway v. Wythes*, 5 De Gex M. & G. 880; *Heathcote v. North Stafford Railway Co.* 20 L. J. N. S. 82; *Ross v. Union Pacific Railroad*, 1 Woolw. 26, 36; *Fallon v. Railroad Co.* 1 Dillon, 121); and yet, where the equities were very strong, a railway company was compelled to build a branch road and make and maintain a wharf (*Wilson v. Furness Railway Co.* E. L. R. 9 Equity Cases, 28). "Rather," said Vice-Chancellor James, in the case last cited, "than allow such a gross piece of dishonesty to go unredressed, the court would struggle with any amount of difficulties in order to perform the agreement." In fact, as Lord Justice Turner said in the first case above quoted, "the interference of a court of equity is the exercise of a discretion, and depends in all cases upon the facts and circumstances of each case." The specific performance or rescission of contracts is not a matter of absolute right in either party. It is matter of sound discretion in the court, to be exercised according to what, under all the circumstances of the case, may appear to be just and right (*Humbard v. Humbard*, 3 Head, 100; *Fish v. Lightner*, 44 Mo. 268).

In *Rayner v. Stone* (2 Eden. 128), Lord Northington refused to enforce specific performance of the covenant of a landlord in a lease to make repairs, but it was upon the ground of the difficulty and uncertainty of knowing and determining on the part of the court what was to be done. "How," he said, "can a master judge of repairs in husbandry? What is a proper ditch in one place may not be so in another; * * besides, how can a specific performance of things of this kind be decreed?" what the covenant enumerated being the repairing of hedges and ditches, the manor house and other buildings, and the setting up of land-marks, stones and fences; and an analogous decision was made by Lord Eldon in *Hill v. Barclay* (16 Ves. 404). In

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Flint v. Brandon (8 Ves. 159), Sir William Grant refused to enforce specific performance of a covenant to put a gravel pit in the same state and condition that it was in before the granting of the lease. He refused upon the ground that the landlord had a complete and more perfect remedy at law. The matter he said was only what it would cost to put the ground in the condition which by the covenant it ought to be. That the landlord could recover damages for the breach of the covenant; and recovering and having the disposition of the money, he might perform the work in such manner as he thought proper; whereas, if specific performance were decreed, a question might arise, if the work were sufficiently done. In *Lane v. Newdigate* (10 Ves. 193), Lord Eldon declined to decree the specific performance of a covenant to keep the banks of a canal, the stop gates and other works in repair, but accomplished the same purpose by enjoining the defendant from using the canal until he did the repairs. In *Franklyn v. Tuton* (5 Mad. 469), Sir John Leach compelled the defendant to alter the elevation of a building which had been erected in contravention of a covenant. In *Storer v. Great Western Railway* (2 Y. & Cal. ch. 48), the court compelled a railway company to perform an agreement to make and maintain an archway through their railway, so as to connect the plaintiff's lands, which were severed by the building of the railroad; to be of sufficient capacity to permit the plaintiff's vehicles to pass through the archway; "there is no difficulty," said the vice-chancellor, "in enforcing the decree. The court has to order the thing to be done, and then it is a question capable of solution, whether the order has been obeyed." In *Saunderson v. Cockermouth, &c. Railway Co.* (11 Beav. 497), the court enforced a similar agreement, though its terms were more general and it was more difficult to execute; and Chancellor Walworth, in *Stuyvesant v. The Mayor, &c. of New York* (11 Paige, 414), compelled the corporation to perform an agreement with the plaintiff to regulate, enclose and improve a public square in the city of New York, even where the plaintiff had recovered in an action at law against the corporation, \$3,056, for their delay in not performing the contract. In short, these cases show that there is no very ma-

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terial difference between contracts to build and contracts to repair. There is a recognized and defined limit applicable to both. A claim to this species of relief may exist under either, and whether it will or will not be granted, depends usually, upon the circumstances of the particular case. The defendant, therefore, was not entitled to have the complaint dismissed upon the ground that it did not contain facts sufficient to constitute a cause of action.

The judge found that the building was not so destroyed by the fire as to be incapable of repair, and that four months was a reasonable time within which to make the repairs; but inasmuch as the building was very old; as it was no longer suited to the growth and increase of business in that locality; being neither of the style, the strength nor of the size required for the business usually carried on there, he took into consideration that it would be a loss and injury to the defendant to compel him to restore the building to its former condition, in compliance with a covenant in a lease that had only about three years to run, and regarding the whole case as one addressed to the equitable discretion of the court, he did not adjudge the specific performance of the covenant, but adjudged instead, that the defendant should pay to the plaintiffs the estimated excess of the value of the lease to them for the residue of the term, over the rent they were to pay, which he found to be \$2,366 88; that is from the 1st of August, 1866, until the expiration of the extended term, after deducting the proportional rent from the 31st of March, 1866, the day of the fire, to the 17th of August of the same year. This amounted in fact to a rescission of the lease, whereby the defendant was relieved from the obligation of performing the covenant, and from all liability thereafter to any action at law thereon for the recovery of damages: whilst the plaintiffs were compensated by an award in damages for the loss and injury they sustained by the non-performance of the covenant.

The judge regarded the special circumstances as affording good reasons why the court should not, in the exercise of its equitable discretion, compel a specific performance. The provision of the fire law (Session Laws of 1866, vol. 2, p. 2009),

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in respect to building upon, raising, enlarging or altering an existing building; the extent to which the building had been destroyed by the fire, and the act of the owner of the adjoining building in taking down the party wall; made a repairing of the building, in compliance with the covenant, exceedingly onerous; but not impossible. It was manifestly to the defendant's interest that he should be relieved from the covenant, and be at liberty, like his brother, to erect a suitable building upon the premises. But he was not in equity entitled to it as a matter of right, the general rule in equity being that if the contract was just and fair at the time it was entered into, events subsequently occurring, and not so involved in it that they must have been present to the minds of the parties at the time of its execution, cannot be brought forward to show the hardship of enforcing it, or as excusing performance, unless these subsequent events are in some way due to the party who applies for the specific performance (see the cases collected in *Fry on Specific Performance*, ch. vi); but like all general rules it is subject to exceptions, and there are cases in which the court, as in the present case, took into consideration the hardship arising from the occurrence of subsequent events (*Webb v. The Direct, &c. Railway Co.* 9 Hare, 129; s. c. on appeal, 1 De Gex. M. & G. 521; *City of London v. Nash*, 3 Atk. 512; 1 Ves. Sr. 12; *Costigan v. Hastler*, 2 Sch. & Lef. 160).

But it does not follow, as the defendant insists, that if the court does not decree specific performance, it must dismiss the complaint, and is precluded from making what it considers a more equitable disposition of the subject-matter before it, for it is a familiar rule that if the jurisdiction in equity attaches in any case from the want of an adequate remedy at law, it shall, having rightfully attached, be made effectual for the purpose of complete relief (1 Story's Equity Jurisp. § 64, h, i, k). It attached in this case, because it was in the power of the court to decree the specific performance, as the repairing of the building was not impossible. The change made by the adjoining owner in the party wall, and the restrictions which are now imposed by statute in building upon an existing building, did not prevent the defendant from repairing the building, so

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as to comply substantially with the covenant; for a covenant, as respects its future performance, when the condition or contingency arises which calls for its fulfillment, will be construed with reference to a public law or regulation enacted after the covenant was entered into, if the law or public regulation in any way affects it; for if a man covenants to do a thing which is lawful, and a subsequent statute hinder him from doing it, the statute repeals the covenant (Platt on Covenants, pp. 587, 588). The defendant could not, under the statute, raise the building as high within some eight or nine feet as it was before, and therefore the rebuilding of it to the height of fifty feet would, in consequence of the statute, be a sufficient compliance with the covenant (*Atkinson v. Ritchie*, 10 East, 530). What was required to be done, moreover, under the covenant, was sufficiently definite and certain. It was to restore the building to the condition in which it was before the fire, within the limit of fifty feet in height, as the fire laws required. It was certainly as definite as the cases previously referred to, before Lord Hardwicke, of the pulling down of an old house and the rebuilding of a new one, and the rebuilding of a house destroyed by fire (*Pembroke v. Thorpe*, 3 Swanst. 437, and *Rook v. Worth*, 1 Ves. Sr. 460).

If, as was held in *Bradley v. Aldrich* (40 N. Y. 504), there is no ground whatever for equitable relief, if the facts disclosed show, that there is a cause of action at law, but nothing calling for equitable interposition, the complaint must be dismissed, and the party left to pursue that remedy to which he should have resorted in the first instance, instead of coming into equity. Thus, in the case cited, the plaintiff brought a suit in equity to have a contract set aside on the ground of fraud, and asked that certain real estate which he had parted with under the contract should be ordered to be reconveyed to him; the court held that the plaintiff was not entitled to the relief asked, having failed to satisfy the court of the frauds alleged, except in respect to one false representation, for which he was entitled to a judgment for whatever damages he might, *in that respect alone*, have sustained, and a reference was ordered to ascertain the damages. It was held, that upon refusing the

equitable relief the court should have dismissed the complaint, as the plaintiffs' remedy for the recovery of damages was by an action at law, which being an action for the recovery of money only, is under the code to be tried by a jury, and therefore not a matter of equitable cognizance.

But in the present case the relief which the court gave could not be obtained in an action at law. In an action at law, damages could be recovered for a breach of the covenant to repair, but the court went much farther than this. It adapted to the special circumstances of the case the equitable relief which it considered appropriate. It relieved the defendant altogether from the strict performance of the covenant, so that instead of repairing, or rather of rebuilding upon the remains of the walls that were left, he might be enabled to erect such a structure as his interest as owner demanded. This relieving of a party from the strict performance of a contract, upon the ground that it would be hard or unreasonable to enforce it, is a very delicate branch of equitable jurisdiction, and is exercised only under strong or very peculiar circumstances (1 Story's Equity Jurisp. §§ 331, 694, 700, and the cases there cited). The judge regarded the circumstances of the case to be such as to warrant it, and the plaintiffs, who, upon the destruction of the building by fire, had nothing but this covenant, make no complaint at the defendant being relieved from the performance of it, or to the annulling of the lease, as the plaintiffs are, upon the equitable disposition which the court made of the whole matter, to receive an equivalent for the pecuniary loss they would otherwise sustain.

The defendant, it may be said, does not want the lease annulled, nor to pay the plaintiffs a pecuniary equivalent for the non-performance of the covenant. But the plaintiffs invoked the equitable aid of the court to compel a specific performance of the covenant, and the specific relief asked was denied, not upon the ground that the plaintiffs' case was devoid of equity, but because the court considered that a more equitable adjustment of the whole matter might be made in the way it devised. The relief given is strictly equitable. It is founded upon a due consideration of the consequences to the defendant of com-

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elling a specific performance and an equal consideration of the equitable rights, under the circumstances, of the plaintiffs. It is a case in which the same remedy could not be afforded at law. At law the defendant could sue for his rent, and the plaintiff for damages for the breach of the covenant; but this would not accomplish what has been effected by the equitable adjustment which has been made in this suit. The plaintiff came into court for the enforcement of an equitable right, a specific performance, which the court has not decreed, because having the whole matter before it, it could, in another way, adjust the equitable rights of both parties, and do what it is the especial province of a court of equity to do, so adjust the remedy as to make it effectual for the purpose of complete relief.

The right of a court of equity, where it refuses a decree for specific performance, either because the defendant, by a conveyance of the property to another party, or by some other act, has incapacitated himself from performing, or in view of the hardship of compelling performance, to give the plaintiff as an equivalent a pecuniary sum, to be ascertained by the application of some equitable and precise rule, or by directing an issue to ascertain the amount of the plaintiffs' damages, is a question upon which there has been such a diversity of opinion among judges, that the whole matter is involved in doubt and uncertainty. There is for the breach or non-performance of a contract a legal remedy by an action for the recovery of damages, and it being a fundamental rule that courts of equity will not interfere where the legal remedy is ample, it is very naturally assumed that if courts of equity cannot or will not compel the specific performance of a contract, they should not proceed to award damages for the non-performance of it, the plaintiff having an adequate remedy for the recovery of damages in an action at law.

There are, however, cases in which this jurisdiction to award pecuniary compensation in lieu of performance, can and ought to be exercised—in which the relief is in its nature equitable—and there is a well marked line to distinguish where a court of equity may and where it may not, upon refusing a

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specific performance, substitute this pecuniary relief; but to ascertain, in the present confused state of the authorities, where this line is to be drawn, will require a careful examination of the adjudged cases.

In *Cleaton v. Levison* (Finch's R. 164), a case decided as early as 1674, the bill was to compel the execution of an agreement, and it was decreed that the defendant should execute the agreement in *specie*, as far as he was capable of doing so, and likewise satisfy the plaintiff for such damages as he had sustained in not enjoying the premises according to the agreement.

In *Hedges v. Everard* (1 Eq. Abr. 18, p. 7), in which a jointress sought to have satisfaction for a defect in the value of her jointure lands, which her husband had covenanted were of a certain value, the objection was taken that the remedy was in damages, which were determinable only at law; but it was said that a master in chancery may properly inquire into the value and defects of the lands, and report it to the court, which may decree that the defect be made good, or send the question to be tried at law upon a *quantum damnificatus*.

In ——— v. *White*, reported in a note to *Newmarch v. Brandling* (3 Swanst. 108, note *a*), the court would not decree a specific performance; but as the report expresses it, "directed only a *quantum damnificavit*, by the defendants not taking the lease."

In *Cudd v. Rutter* (1 P. Wm. R. 570), it would appear from the more correct account of that decision, in Mr. Cox's note to the fourth edition of these reports, Lord Macclesfield reversed the decree of the Master of the Rolls, for the specific performance of a contract for the transfer of stock, and decreed instead, that the defendant should pay to the plaintiff the difference between the value of the stock on the day it was to be transferred and its value when the plaintiff brought his suit; which was decreeing to the plaintiff a compensation in lieu of specific performance, very nearly in the same way that Judge Brady did in the present case.

In *Colt v. Netterville* (2 P. Wm. 305), Lord King overruled a demurrer, stating that the case might at the hearing be attended with such circumstances as would make it just to decree

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that the defendant should either transfer the stock according to his agreement, or *pay the difference*.

In the *City of London v. Nash* (3 Atk. 512), Lord Hardwicke refused a specific performance, saying, "The relief must be by way of inquiry of damages; I am more inclined to this than a specific performance;" and he directed an issue to try what damages the plaintiff had sustained.

In *Denton v. Stewart* (1 Cox, 258; 17 Ves. 276, note *b*), the bill was for a specific performance, and it appearing upon the hearing that the defendant had incapacitated himself from performing, having assigned the lease during the suit, Lord Kenyon referred it to the master to inquire what damage the plaintiff had sustained, and decreed that the defendant should pay to the plaintiff such damage so to be ascertained, together with the costs of the suit.

So far, it may be said, upon the authority of these early cases, that a court of equity, where it cannot, or where it considers, in view of all the circumstances, that it ought not, to decree a specific performance, may, in lieu thereof, award an issue to ascertain the plaintiff's damages; or, if it can do so, may fix the amount of the compensation by the application of some equitable rule or measure.

In *Clinan v. Cooke* (1 S. & L. 25), Lord Redesdale assented to the proposition of the defendant's counsel, that if the plaintiff had put it out of his power to execute a lease, relief must be sought at law, and could not be obtained in equity. This, as will more fully appear hereafter, was correct, the defendant having, before the commencement of the suit, executed a lease to another party, and there was, therefore, no ground for equitable interposition, the plaintiff's remedy being an action at law to recover damages for the breach of the agreement. Lord Redesdale nevertheless decreed that the money which the plaintiff had paid at the making of the agreement should be repaid to him by the defendant with interest.

Sir William Grant entertained some doubt in *Greenway v. Adams* (12 Ves. 401); but upon refusing the specific performance, he directed a reference to a master to ascertain the plaintiff's damages, upon the authority of Lord Kenyon's decis-

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ion in *Denton v. Stewart* (*supra*), remarking that probably, if he had had the benefit of seeing the statement and the development of the principle upon which Lord Kenyon acted, he should be perfectly reconciled to it, and as the relief must consist purely of pecuniary compensation, he thought the master just as competent to decide that as a jury.

Afterwards, in *Blose v. Sutton* (3 Merv. 248), he said: "The competency of a court of equity to give damages for the non-performance of an agreement, notwithstanding the case of *Denton v. Stewart*, has been questioned by very high authority;" and he points out as a discriminating feature in *Denton v. Stewart* that the defendant there had been guilty of a fraud in voluntarily disabling himself from performing the agreement.

In *Gwillim v. Stone* (14 Ves. 128), Sir William Grant refused to order an inquiry before the master to ascertain what compensation should be made to the plaintiff for the loss he had sustained from the defendant's failure to carry the contract into execution. He referred to his former decision in *Greenway v. Adams*, where he had, he said, some doubt upon the principle; but he distinguished the former case, which was for a specific performance, from the one then before him, where the bill was for the delivering up to the plaintiff of the contract for the purchase, on the ground of the defendant's defective title, and that compensation should be made to the plaintiff for the loss he had sustained. He decreed the delivering up of the contract, but denied the reference to ascertain the plaintiff's damages, for the reason that the defendant's defective title was set up by the bill, and the plaintiff therefore knew when he brought the suit that the defendant could not perform the contract and that his proper and only remedy was an action at law to recover damages. In *Hatch v. Cobb* (4 Johns. Ch. 560), Chancellor Kent, for the same reason (that the plaintiff knew when he filed his bill, that the contract could not be specifically performed), doubted the jurisdiction of the court in such a case to assess damages merely; and Lord Cottenham, affirming the decision of the Master of the Rolls, in *Sainsbury v. Jones* (2 Beav. 464), on appeal (5 My. & Cr. 1), held expressly that there was no ground for equitable relief in such a case. He said the plaintiff knew

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when he filed his bill *that he could not compel a specific performance*, and having sought compensation for damages in a court that had not jurisdiction to award them, the decree of the Master of the Rolls dismissing the bill was correct.

In deciding this case, Lord Cottenham said: "I certainly recollect the time at which there was a floating idea in the profession that this court might award compensation for the injury sustained by the non-performance of a contract, in the event of the primary relief for a specific performance failing, and I have formerly seen bills praying such relief; but that arises from my having known the profession sufficiently long, to recollect the time when the decision of Lord Kenyon, in *Denton v. Stewart*, had not been formally overruled, but, at that time, very little weight was attached to it, and very few instances occurred in which the plaintiffs were advised to ask any such relief; and for a short time Sir W. Grant's decree in *Greenway v. Adams*, added something to the authority of *Denton v. Stewart*, although he threw out strong doubts as to the principle of that case. This, however, lasted but a short time, for *Greenway v. Adams* occurring in 1806, Lord Eldon, in 1810, in *Todd v. Gee* (17 Ves. 273), expressly overruled *Denton v. Stewart*; and from that time there has not, I believe, been any doubt upon the subject. Certainly, during the thirty years which have elapsed since that time, I have never supposed the granting of any such relief as being within the jurisdiction of this court."

This is a very strong statement, and by an able equity judge, and yet it is found that equitable tribunals, both before and since, have thought and ruled differently. Lord Eldon, in the case referred to by Lord Cottenham (*Todd v. Gee, supra*), did not overrule *Denton v. Stewart*, although he questioned and qualified it. He said, "I should be inclined to support the *whole* course of previous authority against *Denton v. Stewart*, not being aware that this court would give relief in the shape of damages, which is very different from giving compensation out of the purchase money." As regards this remark about "the *whole course of previous authority*," it is sufficient to state, that the prior cases which I have cited show that, in this respect, Lord Eldon was mistaken. He said further, "My opinion

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is that this court ought not, *except under very particular circumstances*, as there may be upon a bill for a specific performance of a contract, to direct an issue, or a reference to the master," which is admitting that there may be cases in which the jurisdiction can be exercised. And he finally says, "In *Denton v. Stewart*, the defendant *had it in his power to perform the agreement and put it out of his power during the suit*. The case, if it is not to be supported upon *that distinction*, is not according to the true principles of the court," which was a recognition to a certain extent of the general ground upon which this jurisdiction rests.

Chancellor Kent, in *Phillips v. Thompson* (1 Johns. Ch. 150), instead of dismissing the bill for the specific performance, retained the case and ordered an issue of *quantum damnificatus*, and in *Parkhurst v. Van Cortland* (Id. 273), which was a bill for the specific performance of a contract to sell land, he refused the specific performance, but decreed compensation, referring it to the master to ascertain the amount in the mode pointed out by the court. He afterwards, however, in *Hatch v. Cobb* (4 Johns. Ch. 560), had doubts respecting the extent of the jurisdiction. He thought that in very special cases equity might possibly sustain a bill for damages on a breach of contract; but that it was not the ordinary jurisdiction of the court. In that case the defendant had disabled himself from being subjected to a decree for a specific performance by parting with his interest before the suit was brought, and the chancellor said that if he had not parted with his interest it might even then be a point deserving of consideration, whether the plaintiff was entitled to assistance. In the subsequent case of *Kempshall v. Stone* (5 Johns. Ch. 193), he again declared that the court ought not, except in very special cases, to sustain a bill merely for the assessment of damages, saying that the more he reflected upon the subject, the more strongly he inclined to that opinion. He referred to Lord Eldon's remarks in *Todd v. Gee* (17 Ves. 273), and was evidently strongly impressed by Lord Eldon's erroneous statement that the whole previous course of authority was against the exercise of the jurisdiction. Whatever doubt may have arisen from this expression of opinion on the part of Chancellor Kent, it was, at

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least in this State, set at rest by the subsequent decision of the Court of Errors, in *Woodcock v. Bennett* (1 Cow. 711), in which it was held that the usual decree was either a specific performance, or an issue to ascertain the damages; but that when a party had put it out of his power to perform, the court might retain the bill and refer it to a master to assess the damages. In the Supreme Court of the United States, in *Pratt v. Law* (9 Cranch, 494), it was held that it is not consistent with the equity practice to order an issue to ascertain the damages in any case in which the court can lay hold of a simple, equitable, and precise rule to ascertain the amount which it ought to decree; and in *Forrest v. Forrest* (4 Ves. 497), where the master reported that for the breach of the agreement the money received should be paid back with interest, Lord Alvanley said he did not know how a jury could adopt a better rule.

In *Kendall v. Beckett* (2 R. & My. 88), which was a suit for a specific performance, the plaintiff failed to show that the transaction had been on his part in all respects fair (the weight of evidence tending to prove that the price had been inadequate), and the court held that he had altogether failed in making out a case for equitable interposition. The bill prayed, that in the event of the court's refusing a specific performance, it would decree the repayment of the sum deposited at the making of the contract. Lord Brougham refused to do so, "especially," as he said, "in favor of a party whose conduct was tainted with unconscientious dealing." He further remarked, that "even under circumstances entitled to favor, the jurisdiction was, at best, extremely doubtful," referring to what was said by Lord Eldon, in the case before cited, of *Todd v. Gee*, as showing that it could not be exercised, except in a very special case.

In *Jenkins v. Parkinson* (2 My. & K. 12, 13), Lord Brougham said Lord Eldon did not, in express terms, overrule *Denton v. Stewart*, but he did everything short of denying it to be law, and then after some remarks distinguishable for their inaccuracy in the statement of what occurred in the particular cases referred to, he very confidently disposes of *Denton v. Stewart*, and Sir Wm. Grant's ruling, in *Greenway v. Adams*,

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as follows: "The current of *all the previous authority* against it (*Denton v. Stewart*), to which Lord Eldon refers in *Todd v. Gee*, may therefore be considered as *restored*, after a *temporary and dubious interruption*, and it may now be affirmed that these two cases (*Denton v. Stewart* and *Greenway v. Adams*) are no longer law;" a summary disposition of the question, which certainly justifies Lord Campbell's remark, that Lord Brougham was a novice in the Court of Chancery (*Lives of the Chancellors*, vol. 8, p. 421). In *Williams v. Edwards* (2 Sim. 78), the contract having become void by its own conditions, the bill for the specific performance was dismissed, and the vice-chancellor refused to order the repayment of the deposit to the plaintiff, upon the more satisfactory reason, that there was not, from the beginning, any ground for equitable interference, as an action at law lay to recover back the money deposited, the contract, by its own condition, never having gone into effect.

In *Andrews v. Brown*, 3 Cush. (57 Mass.) 135, the question of this jurisdiction was very fully discussed, and the conclusion arrived at by the court was that the decision of Lord Kenyon in *Denton v. Stewart* was reasonable, and conformable to the principles of equity. That it did not make any material difference whether the property was conveyed by the defendant during or before the commencement of the suit, provided the plaintiff was not aware, when he filed his bill for relief in equity, that the defendant had conveyed the property to another, and even in such a case that there might be equitable jurisdiction if the purchaser knew of the existence of the agreement with the plaintiff, and was made a party to the suit; and in the following American cases the jurisdiction was either recognized or exercised (*Oliver v. Crosswell*, 42 Ill. 41; *Bell v. Thompson*, 34 Ala. 633; *Stockton v. The Union Oil Co.* 4 West Va. 273; *Barlow v. Scott*, 24 N. Y. 40).

In *Prothero v. Phelps* (25 L. J. Ch. 105), Lord Justice Turner said, "That it is competent to this court to ascertain damages, I feel no doubt. It is the constant course of the court in the case of vendor and purchaser, where a sufficient case is made for the purpose, to make an inquiry as to the deterioration of the estate, and in so doing, the court is, in

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truth, giving damages to the purchaser for the loss sustained by the contract not having been literally performed ;” and Mr. Fry, in his treatise, pertinently observes, “ It is impossible not to see the great propriety of courts of equity being clothed with such a jurisdiction, so that in cases coming before them by way of specific performance, complete justice may be done to the suitors without their resorting to any other forum ” (Fry on Specific Performance, 346).

It may be stated, as the result of this review, that if there was no ground whatever for equitable interposition when the suit was brought, as where the plaintiff knew, when he brought it, that the defendant could not perform (either from having conveyed the property to another, or from any other cause), the complaint is to be dismissed, the plaintiff having no right to come into a court of equity to get a pecuniary compensation for the injury he has sustained, as he has a full and adequate remedy for obtaining it by an action at law. In such a case it is not only the appropriate, but it is the sole, remedy, for in the common-law action for the recovery of damages, the defendant has a right to a trial by jury, and this cannot be taken away by bringing a suit in equity to obtain what the party can obtain by an action at law. But where it appears affirmatively by the plaintiff's complaint or bill that the contract is just and fair—that it is one which the defendant ought to and can perform—then the jurisdiction in equity attaches ; the defendant is put to his answer, the case comes before the court upon the issue and the proofs for its equitable consideration, and it may decree a specific performance, or, in lieu of performance, award to the plaintiff a compensation in money, to be ascertained by some equitable rule, or by a trial by jury, unless a trial by jury is waived (*Barlow v. Scott*, 24 N. Y. 45, 46), or it may, on the merits, dismiss the complaint altogether.

The exercise of this jurisdiction, where there is anything upon the face of the complaint, or in the proofs, that calls for an equitable determination, is no violation of the right of a trial by jury, for the power to compel the specific performance of agreements is as old as the Court of Chancery ; bills filed for that specific relief being amongst the earliest records of the

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court (Spence, vol. 1, 645; Call. 11, 2); the power to afford equitable relief, where the ordinary judges in courts were incapable, having been exercised long before Magna Charta; first by the council that attended the king's person, and afterwards by the chancellor, whose office and equitable jurisdiction is traceable as far back as the reign of Edward III (Spelmans' Glossary, fols. 106, 107; Madox, c. 11, xix; Vaughan Rev. 320, c. vi; Spence, B. P. 2, B. 1, c. 1, 2, 8; *Martin v. Marshall*, Hob. 63). Indeed, Ooke says that in the reign of Edward IV, all the judges of England declared that the three common-law courts and the Court of Chancery were "all the king's courts, and have been time out of memory of man, so as no man knoweth which is the most antient" (8 Co. Præf.). Whenever, therefore, the jurisdiction in equity attaches, the right to administer any form of equitable relief which the circumstances of the case calls for, follows as incident to the jurisdiction, though it may ultimately be, in whole or in part, the awarding of damages as a substitute for the equitable relief sought as an equivalent, or by way of compensation for the injury or wrong sustained.

The judgment should be affirmed.

Judgment affirmed.

MAYER STERNBERGER *et al.* v. OWEN MCGOVERN.

Plaintiffs agreed to sell to defendant certain land which defendant agreed to buy at a certain price, to be paid by his assuming the payment of certain mortgages on the property and by conveying to plaintiffs certain other land belonging to him; *Held*, that this was not a sale of land but an exchange.

Defendant was unable to carry out his agreement on account of the refusal of his wife to sign a deed releasing her dower, although he endeavored in good faith to induce her to do so. Plaintiffs were aware of these facts, and not having parted with possession of the land they had agreed to sell, nor delivered a deed thereof, they brought an action to enforce a lien for the purchase money, and asked to have the property sold and the proceeds applied to the payment of the purchase money, and for a personal judgment against the defendant for the balance; *Held*,

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1. That not having parted with possession of the property, they could not maintain an action to enforce a vendor's lien for the price.
2. That as the defendant's inability to perform was set forth in the complaint, it showed that there was no ground for equitable jurisdiction; that the complaint should be dismissed, and the plaintiffs left to bring an action for damages for the breach of the contract.

APPEAL by defendant from a judgment entered on the decision of a judge at special term. The facts are as follows:

The plaintiffs being the owners of certain real estate in Thompson street, New York city, entered into a written agreement, March 16th, 1872, with the defendant for the sale of said premises to him for the sum of \$125,000, payable as follows: \$20,000 thereof by defendant's assuming mortgages to that amount as existing liens thereon; \$64,500, by a deed from the defendant and wife to the plaintiffs for a piece of land at Mott Haven (thereinafter in said agreement more particularly described), and the balance, \$40,500, by a purchase-money mortgage on the premises in Thompson street. In the same instrument defendant agreed to sell and convey, and plaintiffs agreed to purchase, the said property at Mott Haven, for the sum of \$82,500, subject to a mortgage of \$18,000, which plaintiffs were to assume. Defendant's wife refused to join in the execution of the deed of the Mott Haven property. Plaintiffs attended at the time and place fixed, prepared to close the sale. The defendant failed to comply with the terms of the contract for the reason above stated.

Plaintiffs then brought this suit against the defendant, claiming a lien on the Thompson street property for the purchase money, and asked that same be sold in satisfaction thereof. The cause was tried on the issues raised by the pleadings, and judgment rendered that plaintiffs recover of and defendant pay the amount of said purchase moneys, and in default thereof that said premises be sold and proceeds applied to such payment, and that defendant be charged with any deficiency arising from said sale, &c. From the judgment thus rendered this appeal was taken.

A. A. Redfield and *T. C. T. Buckley* for appellant.

I. The judge erred in his construction of the contract.

The transaction was a barter or trade, and plaintiffs' obliga-

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tion to take the Mott Haven property on the terms mentioned in the contract is quite as much an integral part of the contract as defendant's undertaking in reference to the Thompson street estate.

There is no option or election in the case. Defendant could, under no circumstances, have escaped from his obligation to convey the Mott Haven property by offering to pay the consideration.

There is, by the terms of the agreement, *no definite money indebtedness created*, dischargeable at the *election* of defendant in an alternative mode of payment, and, therefore, the rule that on failure to avail of the alternative, the money is to be the measure of recovery, does not apply.

This view is the basis on which the decisions relied on by plaintiffs' counsel proceeds. (See *Pinney v. Gleason*, 5 Wend. 399; *Kimpton v. Bronson*, 45 Barb. 629; *Murray v. Harrison*, 47 Id. 493.)

II. The agreements, *being mutual and dependent*, and the defendant, as found and adjudged by the court, not being obliged to convey the Mott Haven property, it is clear that specific performance should not be enforced of the other part, and an equitable lien declared to exist.

1. Want of mutuality is always a ground for refusing specific performance (Willard's Eq. Jurisp. p. 267, and cases cited; *Ogden v. Fassick*, 9 Jurist, N. S. 288; *Peto v. Brighton R. R.* 1 Hern. & Miller, 468, 480, 481-483; Story Eq. Jur. § 736).

2. The contract price is not recoverable or enforceable by way of lien or otherwise, where specific performance would be refused (*Clark v. Hall*, 7 Paige, 385; *Congregation Beth Elohim v. Presb. Church*, 10 Abb. Pr. N. S. 484).

III. This is not a case in which the plaintiffs are entitled to a lien for unpaid purchase money of the Thompson street property.

The plaintiffs' agreement to take in payment for that property a conveyance of other premises, and a purchase-money mortgage, was a waiver of the security of any vendor's lien.

1. There can be no lien except where the purchase money is payable in cash, as that term is understood in the law (*Hoyt*

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v. *Van Alstyne*, 15 Barb. 568. See also 11 N. Y. Leg. Obs. p. 258).

2. At all events, so far as the portion of the contract price represented by the Mott Haven property is concerned, there can be no lien.

That is within the exception to the doctrine recognized by the cases cited on the oral argument (*McKillip v. McKillip*, 8 Barb. 552, 558; *Coit v. Fougere*, 36 Barb. 195; *Hare v. Van Deusen*, 32 Barb. 95 and 100; *Arlin v. Brown*, 44 N. H. 102; *Chapman v. Beardsley*, 31 Conn. 115).

3. It is clear that the plaintiffs have now no better claim for a lien than they would have in case the defendant had, in fact, taken their deed of the Thompson street property, and had failed to convey in exchange the Mott Haven property, and to execute the purchase-money mortgage as agreed.

But the authorities are uniform that a vendor who takes, or agrees to take, in payment, instead of cash, chattels, or securities, such as a mortgage on other land, or a mortgage even on the land sold, will be deemed to have waived the security of his vendor's lien (*Fish v. Howland*, 1 Paige, 20, 30; *Coit v. Fougere*, 36 Barb. 195; *Selby v. Stanley*, 4 Min. 65; *Baum v. Grigsby*, 21 Cal. 172; *Camden v. Vail*, 23 Id. 633; *Mattie v. Wells*, 18 Ind. 151).

The case is even stronger when, as in this case, the vendor agrees to take, not a conditional conveyance (as a mortgage), but an absolute conveyance of other property.

John G. Vose and *Everett P. Wheeler*, for respondents.

L The plaintiffs have a lien upon the Thompson street property until they are paid for it. This lien "is wholly independent of any possession on their part, and it attaches to the estate as a trust equally, whether it be actually conveyed or only contracted to be conveyed."

In other words, as is sometimes said: The vendor is trustee of the land for the vendee's benefit, and the vendee is trustee of the purchase money for the vendor's benefit.

The general rule is undoubted, and the burden is upon

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the defendant of showing exemption from it. This he has not done (*Garson v. Green*, 1 Johnson Ch. 308).

Exemption from the rule is claimed :

1. Because the contract to sell is still executory, and the plaintiff still has title and possession. At common law, a party always had a lien upon an article sold, whether real or personal, until he parted with the possession of it (2 Story Eq. § 1216).

The doubt arose whether equity would give a lien where the vendor had parted with the possession, and it was held that such a lien existed, although the vendor retained the title (2 Story Eq. § 1217; *Champion v. Brown*, 6 Johns. Ch. 398).

In equity the vendee is the owner, and his interest descends to his heirs (*Champion v. Brown*, *ubi supra*; *Havens v. Patterson*, 43 N. Y. 218, 221).

2. Because the purchase money was to be paid in land. The reply to this is twofold. The objection is not well taken in point of fact. \$40,500 of the purchase money was to be paid by the vendee's bond and mortgage on the land sold. Nor is it valid in law. It overlooks the fact that this land has not, and cannot be conveyed. It overlooks the fact that the bond and mortgage have not been given. All that the vendor now has is the vendee's personal obligation to pay the purchase money, and it is perfectly well settled that this does not discharge the lien (2 Story Eq. § 1226; Sugden on Vendors and Purchasers, ch. 19, §§ 13, 15; pp. 675, 676, 14 Eng. ed.; *Winter v. Lord Anson*, 3 Russell, 488; *Garson v. Green*, 1 Johns. Ch. 308; *Manly v. Slason*, 21 Vermont, 271).

II. Should the court, however, be of opinion that the plaintiffs have no lien in this case, they are entitled to judgment for the unpaid purchase money.

The cases cited by the defendant hold, that where the plaintiff neither avers nor proves facts sufficient to entitle him to a judgment at law, the judge cannot refer the case to enable the plaintiff to prove and recover damages. They hold that the legal remedy in such case is not within the scope of the case made by the complaint. But the Court of Appeals held unanimously, in *Bradley v. Aldrich* (4 N. Y. 504), that the

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plaintiff might, by proper averments in his complaint, unite the legal and equitable causes of action. There can be no question that they have done so here. The complaint states all the facts necessary to substantiate an action at law, and demands a personal judgment.

In such a case, even if the defendant had demanded a jury trial, and this had been improperly denied, he is not entitled to dismiss the complaint, but only to have the case sent to a jury to be tried (*Stevenson v. Buxton*, 37 Barb. 13; *Genet v. Howland*, 45 Barb. 573).

III. The cases cited by the appellant, on the subject of mutuality, all arose upon contracts, an essential part of which was in its nature incapable of specific performance under the direction of the court, *e. g.* an agreement to render certain personal services, as in *Ogden v. Fossick* (9 Jurist, N. S. 288). But the law is well settled, that in other cases the want of mutuality is no defense to an action for specific performance.

1. Where, owing to the partial failure of title on the vendor's part, he is unable entirely to perform the contract, he cannot compel performance by the vendee, but the vendee may, at his election, compel the vendor to convey that portion of the land to which a good title can be made, with an abatement from the price for the part not conveyed (Story Eq. §§ 778, 779; *Harsha v. Reid*, 45 New York, 415; *Vorhees v. De Meyer*, 2 Barb. 37).

2. The vendee can compel the performance of a contract to convey land, executed by the vendor, but not by the vendee, for the reason, among others, that the filing of the bill gives sufficient mutuality, so that after such filing the vendor could compel performance by the vendee (Story Eq. § 736 a; *Worrell v. Munn*, 5 New York, 229, 246; *White v. Schuyler*, 1 Abb. Pr. N. S. 300; *McCrea v. Purmort*, 16 Wend. 460).

So that, although, if it were conceded for the sake of the argument, that the defendant could not have compelled a conveyance of the Thompson street property after the neglect on his part to accept the deed when duly tendered, yet he is now entitled to a conveyance of it upon complying with the judgment.

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Indeed, this adjudges him to be in equity the owner of that property. And ever since the commencement of this action, he has had a right to a deed of that property upon paying the purchase money.

3. So an agreement to convey land or do any other act will be enforced, though there is no corresponding agreement on the part of the vendee to buy the land. In such cases the vendee or covenantee has his option whether to comply with the terms or not; but if he does comply with them, he can compel a conveyance (*In the Matter of Hunter*, 1 Edward's Ch. 1; *Lobdell v. Lobdell*, 36 New York, 327; *Sands v. Crooke*, 47 N. Y. 564).

BY THE COURT.*—LARREMORE, J.—It is material in the decision of this case that the true construction of the contract between the parties should first be determined. It should be interpreted in that sense in which the parties understood it at the time of its execution (*Barlow v. Scott*, 24 N. Y. 40, and cases there cited).

Did the parties then intend to make an exchange of their respective pieces of land, or was the sale of each an independent transaction?

If there had been no reference in the terms of sale of the one to the other piece of property, there would be little doubt that each sale was entire and independent, although the conditions of each were contained in one instrument (*Johnson v. Johnson*, 3 Bosanquet & Puller, 162; *Mayfield v. Wadeley*, 3 Barn. & Cress. 357; *Croome v. Lediard*, 2 Mylne & Keene, 251).

The price of the Thompson street property is stated at \$125,000, part payment of which, to wit, \$64,500, the plaintiffs agreed to receive by a deed from defendant and his wife *of a piece of land at Mott Haven in said contract thereafter more particularly described*. Here is found a direct reference in plaintiffs' agreement to that of the defendant, and from the nature thereof and the property which was the subject of it, it is apparent that the covenants and conditions therein contained

* Present, DALY, Ch. J., LARREMORE, and J. F. DALY, JJ.

were mutual and dependent (Fry on Spec. Perf. § 540, p. 170; *Ogden v. Fossick*, Ct. of Appeals in Chancery, 9 Jurist, N. S. part 1, p. 288).

In the case last mentioned the owner of a coal wharf agreed to let it, and at the same time agreed to act as the agent of the tenant in the coal business, and not to act for any other person, and it was held that the agreements were inseparable, and specific performance, was refused of the agreement to let, because the Court could not decree performance of the other.

Under the contract in question the parties were entitled to a delivery of the thing *in specie*, and not its money valuation, which was intended as a mode of computation in adjusting the amount due on settlement between them. Any other construction of the contract would defeat its obvious intention.

Suppose the Thompson street property had appreciated in value pending the execution of the contract and the time fixed for the delivery of the deed, would the plaintiffs' obligation to convey have been discharged by the payment of the sum named as the consideration thereof? Would they have been allowed to claim the prospective increase which in equity belonged to the defendant?

Could the defendant have fulfilled his part of the agreement by refusing a deed and paying \$64,500?

What satisfactory means are there of "determining what represents the money value of a specified estate to a specified individual?"

Having reached the conclusion that the contract was for the exchange of property between the parties, let us next inquire to what extent their relations under it were changed, by defendant's inability to perform.

It appears from the findings of fact that such inability resulted from the refusal of defendant's wife to join in the deed of the Mott Haven property, although he in good faith endeavored to induce her to do so, and that no damages were claimed or proved as ensuing therefrom. Neither is there any imputation of fraud or collusion on the part of the defendant. As the court could not enforce the execution of said deed by defendant's wife, it would not decree specific performance of the con-

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tract in question and order performance of an impossibility (Fry on Spec. Perf. §§ 665 and 666, pp. 201, 202).

If the agreement were for the purchase and sale of the Mott Haven property only, the refusal of defendant's wife to join in the deed would bar plaintiffs' of their right to maintain specific performance, and leave them to their action at law for damages upon the covenant (*In re Jane Hunter*, 1 Edw. Ch. 1).

Shall they now be allowed to claim the benefit of a unilateral right to enforce a contract of exchange, containing mutual covenants and conditions, where the same objection exists to its performance?

The subject of the contract is land, for the sale and conveyance of which it specifically provides. Such a contract is clearly distinguishable from those in *Pinney v. Gleason* (5 Wend. 393); *Kimpton v. Bronson* (45 Barb. 629); *Murray v. Harrison* (47 Barb. 493); and *Fletcher v. Derickson* (3 Bosw. 181), where a definite money indebtedness was created with an option to the debtor to discharge the same in an alternative mode of payment.

This action was brought to enforce the plaintiffs' lien as vendors upon the Thompson street property, for the purchase money thereof. They have never parted with its possession, nor received any payment on account of the purchase.

"This lien," says Judge Story, "is wholly independent of any possession on the part of the vendor, and it attaches to the estate as a trust equally, whether it be actually conveyed or only be contracted to be conveyed" (2 Story Eq. Juris. § 1218).

No transfer of the property by the vendor destroys the lien. The principle upon which it is sustained is that of an implied trust, as where the vendor delivers possession of an estate, without receiving the purchase money (Sugden on Vendors and Purchasers, chap. 19, §§ 1 and 2, pp. 670 and 671, 14 Eng. ed.)

None of the authorities recognize the right to the lien where the vendor has not parted with the possession, or received part payment of the purchase money (4 Kent's Com. sec. 58, p. 169; *Burgess v. Wheate*, 1 Eden, 211; *Mackreth v. Symmons*, 15

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Ves. 329, 337; *Garson v. Green*, 1 John. Ch. 308; *Hughes v. Kearny*, 1 Sch. & Lef. 132; *Champion v. Brown*, 6 John. Ch. 402; *Bayley v. Greenleaf*, 7 Wheat. 40; *Daniels v. Davidson*, 16 Ves. 249; *Austen v. Halsey*, 6 Ves. 483; *McLean v. McLellan*, 10 Peters, 625, 640; *Ludlow v. Grayall*, 11 Price, 58; *Finch v. Earl Winchelsea*, 1 Peere Wms. Ch. 278; *Smith v. Hubbard*, 2 Dick. 730; *Fish v. Howland*, 1 Paige, 20; *Warner v. Van Alstyne*, 3 Paige, 513; *Shirley v. Congress Sugar Refry*, 2 Edw. Ch. 505; *Bradley v. Bosley*, 1 Barb. Ch. 125; *Clark v. Hall*, 7 Paige, 382).

That the vendor has surrendered possession of the premises, either by deed, or under contract of sale, or upon part payment of the purchase money, cannot affect his right to the lien, which rests upon the equitable principle, "that a person who has gotten the estate of another, ought not in conscience, as between them, to be allowed to keep it, and not to pay the full consideration money" (2 Story's Eq. Juris. §§ 1219).

In *Burgess v. Wheate* (*supra*), the Master of the Rolls, in discussing the doctrine of equitable liens, says, "as to the vendor's keeping both the estate and the money, it is analogous to what equity does in another case, as when a conveyance is made prematurely before the money is paid, the money is considered a lien on that estate in the hands of the vendee. So, where the money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor."

It would thus appear that the plaintiffs, who are still in full possession of their property (and to which defendant cannot now, on account of his default, make any claim), have not a lien thereon for the purchase money. They have parted with nothing and received nothing; and their only remedy, under the circumstances of the case, is an action at law for damages for a breach of the contract.

If the conclusion at which I have previously arrived be correct, that the contract in question is an entirety, and the covenants thereof mutual and dependent, this action must fail. The plaintiffs not being entitled to a specific performance of the contract, cannot maintain their lien for the purchase money,

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especially while in actual possession of the property itself, and without having received any payment thereon. The same objection necessarily applies to the proposition that the decree be modified and made a judgment for the amount of the purchase money.

I think the decree should be reversed, and the complaint dismissed without costs.

DALY, CH. J.—I concur in Judge Larremore's opinion. The defendant's inability to perform was known at the time of the commencement of the suit; the fact that he apprised the plaintiffs of his wife's refusal to unite in the conveyance is set forth in the complaint; and this being the case, the plaintiffs' only remedy was an action at law for the recovery of damages for the breach of the agreement. He does not claim, in his complaint, to recover damages; and if he had, the court could not, in this action, have afforded him that relief, as no equitable jurisdiction whatever existed when the suit was brought. *See the authorities and reasons stated in the case of Beck v. Allison, decided at the present term.* There is, as Judge Larremore has remarked, no imputation of fraud or collusion on the part of the defendant; but, on the contrary, the judge has found that he endeavored, in good faith, to induce his wife to unite with him in the conveyance. The evidence shows that not only the defendant, but the plaintiffs also, at the defendant's request, tried to persuade her to sign the deed, but she would not; and that the defendant was willing throughout, if the plaintiffs would accept it, to sign the deed himself. Under these circumstances, the defendant's demand, in his answer, for judgment dismissing the complaint, should have been granted.

Judgment reversed.

Edelmuth v. McGarren.

ISAAC EDELMUTH v. ALEXANDER MCGARREN.

The sale of lottery tickets being illegal, a lease of premises to be used for the purposes of such sale is void, and the rent reserved thereon cannot be recovered.

APPEAL by defendant from a judgment of the First District Court, entered in favor of the plaintiff, on the verdict of a jury.

The plaintiff, by an instrument in writing, leased to the defendant a store or office in West Broadway, in this city, for the term of two years and eleven months, and this action was brought by him to recover one month's rent under that lease.

The defense interposed by the defendant was, that the premises were let and hired for the purpose of vending or selling lottery policies therein.

On the trial, all the testimony by which it was sought to show that at the time when the agreement for the letting of these premises was made, it was understood between the parties that they were to be used for the purpose aforesaid, was excluded by the justice; and he directed the jury to find a verdict in favor of the plaintiff.

BY THE COURT.*—LOEW, J. [After stating the above facts.]—In rejecting the evidence offered by the defendant, the court below erred.

By the laws of this State the carrying on or conducting of a business for the sale of lottery tickets is unlawful, and every contract made for the purpose of aiding, assisting, or furthering the same is void.

If, therefore, it was understood between the parties, at the time of making the agreement for the lease, that the store in question should be used and occupied by the defendant as a lottery office; and that, as would seem from the latter's

* Present, DALY, Ch. J., ROBINSON and LOEW, JJ.

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testimony, the plaintiff subsequently fitted the same up, with the view that it should be so used and occupied, then the lease was void, and the plaintiff cannot recover under it (*Updike v. Campbell*, 4 E. D. Smith, 570).

A party will not be permitted to come into a court of justice, and invoke its aid for the purpose of enforcing a contract or agreement made and entered into by him, in regard to a transaction expressly prohibited by law.

It is true the plaintiff denied that he altered or fitted up the premises for the object indicated; but that was a question of fact for the jury to determine.

The judgment should be reversed.

Judgment reversed.

JOHN W. MURRAY v. JOHN H. CLARK *et al.*

A coastwise sea-going steam vessel not sailing under register, within the meaning of § 51 of the act of Congress of February 28th, 1871, in relation to pilotage for steam vessels, is one that is enrolled and licensed for the coasting trade in the manner provided by law, whose license is renewable annually; a vessel sailing from one part of the coast of the United States to another, or which is employed in the whale or coast fisheries.

The casual circumstance of such a vessel's stopping at a foreign port from stress of weather or other justifiable cause, not in the way of business or traffic, does not affect her specific character as a "coastwise sea-going steam vessel," under the United States act.

Proof that plaintiff, ten miles from Sandy Hook, offered his services as pilot, and that at that time there was no pilot on board of the vessel, *Held*, sufficient to show that plaintiff was the first pilot speaking or offering his services to the vessel.

APPEAL by defendants from a judgment of the First District Court.

The action was brought by the plaintiff, a Sandy Hook pilot, licensed under the State law, against the defendants as part owners of the steamer *St. Louis*, for pilotage under § 29 of the Act of April 3, 1857; 1 L. of N. Y. 1857, p. 502.

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The defendants claimed that the *St. Louis* was a coastwise steam vessel, in charge of a U. S. pilot, and that the act of Congress of February 28th, 1871, made such a vessel subject only to the navigation laws of the United States. That the State act was inoperative in such a case.

They also claimed that the plaintiff had not proved that he was the pilot first speaking or offering his services.

In regard to the first point, it was admitted on the trial "that, at the time alleged in the complaint, the steamer *St. Louis* was, and that for more than a year previously she had been, and that she has since continued to be, employed in and as one of Cromwell's line of steamers, running between New York and New Orleans regularly, and stopping at no other ports, save that twice—one time being on the voyage in question, on her passage from New Orleans, she stopped at Havana, and that on that voyage she was sailing under a register. It is further admitted that the *St. Louis* has always been a domestic vessel, wholly owned by citizens of the United States, and that on, before and after the voyage in question, the said steamer was under the control and direction of her master, who was a pilot duly licensed by the inspectors of steam vessels, according to the acts of Congress in such cases made and provided."

As to the question of whether the plaintiff was the first pilot speaking or offering his services, the case was submitted on the following affidavit:

"John W. Murray, being duly sworn, says; that he is a duly licensed pilot; licensed to pilot vessels from and into the port of New York by way of Sandy Hook (license produced). On the 23d day of May, 1871, off Long Branch, about two miles and a half from the beach, at about 4 p. m. of the afternoon of said day, I was in pilot-boat No. 7, as a pilot, and ran to about one hundred feet of the steamer *St. Louis*, and offered my services to the captain of the ship, and asked him if he wanted a pilot, and he said "No." He did not stop his vessel, nor did he slack up. He did not have any pilot, nor did he take me or any other pilot.

Cross-examined:—The reason I say that the *St. Louis* had no other pilot, and did not take any other pilot, is that from

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the place I spoke him I could see his vessel five or six miles, and no other pilot-boat spoke him in that five or six miles. I spoke him about ten miles from Sandy Hook. By five or six miles I mean from the place I spoke him; five or six miles toward Sandy Hook, as he continued his course.

Man & Parsons, for appellants.

I. The regulation of pilotage is within the exclusive jurisdiction of Congress when it sees fit to act. The recent case of *Cisco v. Roberts* (36 N. Y. 292, *supra*, *Id.*), holds pilotage laws are regulations of navigation. Regulations of navigation are regulations of commerce (*Gibbons v. Ogden*, 9 Wheaton, 1; *Hobart v. Drogan*, 10 Peters, 108; *Norris v. City of Boston*, 7 How. U. S. 317; *New York v. Milne*, 11 Peters, 158; *Cooley v. Port Wardens, &c.*, 12 How. U. S. 317).

The power to regulate commerce is vested in Congress (Constitution of U. S. art. 1, § 8, P. 3).

Although, in the absence of Congressional regulations, a State may legitimately legislate as to pilotage, yet an exercise by Congress of its power is controlling, and, *ipso facto*, abrogates and annuls the previous legislation of a State, and deprives it of further power of regulation thereon (*Cooley v. Port Wardens, &c.*, 12 How. U. S. 319; *Sinnot v. Davenport*, 22 Id. p. 243).

Congress having made certain regulations as to pilotage, so far as any regulations of any State on that subject are inconsistent with the Congressional regulations, they are unauthorized and invalid (*New York v. Milne*, 11 Peters' R. 158; *Sinnot v. Davenport, supra*).

The Court of Appeals held in the case of *Cisco v. Roberts* (36 N. Y. 292), that the State laws regulating port pilotage were not superseded by the terms of the earlier act of Congress of August 30th, 1852. The court held that that act did not in purpose or effect prevent State port pilotage laws. It also held that it was only in the absence of federal legislation, that the States had the right to pass such laws.

The court expressly refused (page 295) to consider the

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effect of the act of Congress of July 25th, 1866, that having been passed prior to the decision, but subsequent to the facts out of which the controversy arose; in the case of *Sturgis v. Spofford* (45 N. Y. 446), the same court held that from the time Congress assumes the exercise of the powers conferred by the Constitution, the State law becomes inoperative.

II. The occurrence in this case was in May 23d, 1871, and the question therefore arises under the act of February 28th, 1871. That provides that all coastwise sea-going vessels and all steam vessels shall be subject to the navigation laws of the United States, and that no State government shall pass any laws levying pilot charges upon any steam vessel, with the only proviso for port pilotage in the case of vessels entering or leaving port, other than coastwise steam vessels.

III. The whole question, therefore, is, was the *St. Louis* a coastwise vessel?

This she clearly was. She was under a register, but that did not constitute her otherwise than a coaster.

Whether she should sail under a register or under an enrollment was purely a question of choice for her owners. There might be convenience in her being registered for which they were willing to pay the enhanced expense. That did not control the route. Her route was between New York and New Orleans. It was that which gave her her character, and that confessedly is a coastwise route. On the voyage in question, it is true, she happened to go into Havana. If her route had been between Havana and New York, she would not have been a coastwise vessel, but such was not the case. She plied regularly to and from New Orleans, and on the voyage in question was bound from New Orleans. It is confidently submitted that her accidental stoppage at Havana did not change her character.

IV. The plaintiff claimed what is substantially a penalty. He failed entirely to show that he was the first pilot speaking or offering his services. He testified that no vessel subsequently spoke the *St. Louis* so long as she was in sight, but he did not show that no vessel previously spoke her; the burden was on him to show that he was the first pilot.

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George W. Blunt, for respondent.

I. A coasting (vessel) is: 1. One which sails near the shore. 2. A vessel that is employed in sailing along the coast, or is *licensed* to navigate or trade from port to port in the same country.

To constitute a vessel a coaster, she must first obtain an enrollment or license; with such she is not liable for pilotage, and must confine her voyages to ports situate in the same country, but she can be registered, thereby obtaining the additional privilege of going to foreign ports; but immediately upon becoming registered, she also becomes liable for pilotage, although only a coaster. She loses her character of a coaster (3d Kent, 308).

The act of February 28th, 1871, provides that all steam coastwise vessels shall be exempt from paying pilotage or employing any pilot *if not under register*; if under register what must she do? she becomes liable.

II. Can a pilot licensed by the government inspectors, pilot a vessel into and out of a local port?

The Court of Appeals has decided in the case of *Cisco v. Roberts* (36 N. Y. R. 292), that pilots appointed by the inspectors of the government can only pilot for the voyage, and not in and out of those ports where there are port (local) pilots.

A State statute restricting the pilotage of vessels through particular waters to a particular class of qualified pilots is not unconstitutional as trenching upon the exclusive power of Congress to regulate commerce (*People v. Sperry*, 50 Barb. 179).

It was also decided in the Court of Appeals (May term, 1871), that the United States statutes did not authorize a pilot appointed by the government inspectors of boilers, hulls, &c., to pilot a vessel in and out of port, but only applied to such government licensed pilots during the voyage, *i. e.*, the duties of the government pilots ceased when the vessel was spoken by a port pilot (*Sturgis v. Spofford*, 45 N. Y. 446).

The constitutionality of the acts of Congress of 1789, 1837, and 1852 was brought before the Supreme Court of the United States, December term, 1864, in the case of *The Pacific Mail*

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Steamship Company v. William H. Joliffe, and the acts were there held to be constitutional; and, in addition, the court held "that all vessels coming into the port of San Francisco under *register*, or from a foreign port, should take a pilot duly licensed for the port they were about to enter, and that the refusal to take a pilot subjected the owners, master, engineer, &c., to the amount of pilotage as if one had been employed, which in California is half pilotage, and that the pilot licensed by government inspectors on said vessel was there for the voyage only, and for no other purpose; not to pilot said vessel into a port where there are port pilots (2 Wallace, 160)."

The act of Congress of 1852, ch. 106, requiring steamers to have pilots for the voyage, does not dispense with the necessity of employing the pilots of a port in accordance with the local laws, but the pilot for the voyage must surrender his vessel to the port pilot when spoken by him (*Chapman v. Jackson*, 9 Richardson's (South Carolina) Reports, p. 209, decision of Court of Appeals of said State).

As to coastwise license (*Gibbons v. Ogden*, 9 Wheaton, U. S. 7; *Foster v. Davenport*, 22 How. U. S. 244). Presumptions (2 O. H. Rec. 142; Domat. vol. I, p. 819, § 4; Sub. Div. 20, 67; 1 Star Eq. 34).

BY THE COURT.*—DALY, CH. J.—The facts stated in the plaintiff's affidavit were sufficient to warrant a finding that the plaintiff was, within the meaning of the State law of April 3, 1857, § 29, the pilot first speaking or offering his services to pilot the vessel. The remaining question is, whether the vessel was a "coastwise steam vessel," within the meaning of the 51st section of the United States act of February 28, 1871.

That section provides that all vessels propelled in whole or in part by steam, when navigating within the jurisdiction of the United States, shall be subject to the rules and regulations established by the United States for the government of steam vessels, and that every coastwise seagoing steam vessel, subject to such rules and regulations, and to the navigation laws of the United States, *not sailing under register*, shall, when under

* Present, DALY, CH. J., ROBINSON and LOWE, JJ.

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way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. This section further declares that no pilot charges shall, by the authority of any State or municipal government, be levied upon any steamer piloted as therein provided for, and a subsequent provision in declaring that nothing in the act of 1871 shall be construed to annul or affect any regulation established by the laws of any State requiring vessels entering or leaving a port in that State to take a pilot, expressly excepts "coastwise steam vessels" from the operation of this saving clause. It follows, from these provisions, that coastwise sea-going steam vessels cannot, by any law of the State, be compelled to take a State pilot upon entering or leaving any port in this State, such vessels being piloted by pilots licensed by the inspectors of steamboats under the law of the United States, it being well settled that this is a matter within the exclusive authority of the government of the United States, if it thinks proper to exercise it; and any law enacted by the general government upon this subject, supersedes the authority of any State law that may be, in whole or in part, inconsistent with it (*Steamship Company v. Joliffe*, 2 Wall. 450; *Cisco v. Rogers*, 36 N. Y. 292; *Sturgis v. Spofford*, 45 Id. 446).

The question then presented is what is meant in this provision by a "coastwise sea-going steam vessel," and it appears to me that the section itself gives the explanation by the language "not sailing under register." Under the various laws of the United States collectively known as the registering acts, vessels obtain their national character by being registered, enrolled or licensed. If under twenty tons, they may be licensed only. If twenty tons or over and they are to be employed in the coasting trade, the whale or the cod fishery, they must be both licensed and enrolled, and the license must be renewed annually (Act of February 19th, 1793, §§ 1, 4, 5) and for any trade or purpose beyond this they are registered (Act of December 31st, 1792). Our laws do not positively require registration or enrollment, but until a vessel is registered or enrolled she is not an American ship. If she engages in the foreign, the coasting trade, or the fisheries, she is liable to for-

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feiture, and as she cannot, without her proper papers, have the privileges of a foreign or an American vessel, her registry or enrollment becomes a practical necessity. When this statute, therefore, refers to a coastwise sea-going steam vessel, not sailing under registry, it must mean one that is enrolled and licensed for the coasting trade in the manner provided by law, whose license is renewable annually; a vessel sailing from one part of the coast of the United States to another, or which is employed in the whale or coast fisheries. It certainly does not refer to a registered vessel that may trade or sail to any part of the world, as it expressly declares "not sailing under registry."

It appears to have been the design of the act to require steam vessels of this description to be under the control and direction of pilots licensed by the inspectors of steamboats. Making frequent voyages, and sailing in and out of ports upon our coast at short intervals, they are, for the better security of life upon such vessels (Act of February 28th, 1871, title and sections 14, 15, 19, 51) required, when under way and not upon the high seas, to be under the control and direction of the peculiar class of pilots provided for by this act; and as these pilots have charge of them when entering or coming out of the ports of this State, there is no occasion for the services of State pilots. To distinguish them from all other steam vessels, they are, as I have stated, described in the act as "coastwise sea-going steam vessels, not sailing under registry."

The State pilot law of April 24th, 1867, in no way conflicts with the provision of the United States act; the eleventh section of the State law imposing the obligation of taking a pilot licensed by the State board, only upon the masters of foreign vessels, vessels coming from a foreign port, and vessels sailing under registry.

A coastwise vessel is one sailing by the way of, or along a coast. In a certain sense, the *St. Louis* was a vessel of this description. For a year previous to the commencement of this suit she was employed as one of a line of steamers running regularly between New York and New Orleans, but was not necessarily limited to running by the way of, or to and from ports upon our coast. She was a registered vessel, and being

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so, was privileged to go to or stop at foreign ports, and did so. Upon two occasions she stopped at other ports, one being the voyage in question, when she stopped at Havana upon her voyage from New Orleans to New York, and when the plaintiff offered his services, she was, in the language of the State law, both a registered vessel and coming from a foreign port, Havana. If she had been an unregistered vessel, the casual circumstance of her stopping at a foreign port from stress of weather or other justifiable cause, not in the way of business or traffic, would not affect her specific character under the United States act as a coastwise sea-going steam vessel, not sailing under register. But being a registered vessel, she stopped at Havana as she was privileged to do, and for all that appears may have done so not from necessity, but in the course of business. The admission states that upon the voyage in question she was under the control and direction of her master, who was a pilot duly licensed by the inspectors of steamboats, according to the United States act of 1871. I do not think that this affects the question, whether she was or was not the kind of vessel provided for by that act; for if she were not, she would not become so by the inspectors of steamboats licensing her master as a pilot under the United States act. That was a privilege, office, or right personal to him, which in no way attached to the vessel, if she were not of the description or class required by that act to be under the direction and control of such a pilot, when not upon the high seas.

The judgment, I think, should, therefore, be affirmed.

Judgment affirmed.

Stewart v. Berge.

JOHN STEWART *et al.* v. LOUIS BERGE.

On an appeal from a judgment of a District Court, and pending a stay of proceedings thereon, an order was made, on motion of the respondent, that the appeal should be dismissed unless the return was filed within a specified time. The return was not filed within such time, and the respondent, upon filing an affidavit to that effect, issued execution on the judgment. *Held*, that this was irregular, and that the appeal was not dismissed without the entry of an order to that effect.

Where a motion is granted conditionally upon the failure of the opposing party to do a certain act, if the act is not performed, the proper practice is for the moving party to show, by affidavit, such failure to perform, and thereupon to apply *ex parte* for an order granting the motion absolutely.

APPEAL by plaintiffs from an order setting aside an execution on the ground that it had been issued pending a stay created by an appeal.

Plaintiffs having recovered a judgment in the Eighth District Court, the defendant appealed and gave security to secure a stay of proceedings pending the appeal. On April 22d, 1872, Judge Loew made an order for the defendant to procure the return to be filed on or before April 27th, 1872, or an order to be entered dismissing the appeal, and on April 29th, a further order for the defendant to have until and including May 6th, to procure the return to be filed, and if not so filed the appeal to be dismissed. On June 25th, 1872, the plaintiffs' attorney filed an affidavit that Judge Loew's orders had not been complied with, and issued execution on the judgment, as if the appeal had been dismissed.

On application of the defendant the execution was vacated on the ground that it was issued pending the stay by reason of an appeal having been perfected and never dismissed. The other facts necessary to an understanding of the case are stated in the opinion.

David McAdam, for appellants.

Where a party is relieved from a regular order on terms; it is the duty of the party applying for such relief, to draw up and enter the order granting the same, and if he neglects to do

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so, the adverse party, upon filing an affidavit showing such neglect, and that the terms on which relief was to be granted have not been complied with, may proceed to carry into effect the original order, without entering an order, upon the application to be relieved against it (*Hoffman v. Tredwell*, 5 Paige, 82). The terms of the order of April 29 were never complied with, and on filing an affidavit to that effect, an execution was issued. This was regular. It certainly did not require another argument to make the orders of Judge Loew, made after argument, effective, nor was an *ex parte* order necessary to make these effective (see Daniel's Ch. Pr. 4th Am. ed. vol. I, p. 741).

C. F. Wetmore, for respondents.

BY THE COURT.*—DALY, CH. J.—The plaintiff in this case moved to dismiss the appeal for the want of a return and the final order made by Judge Loew, April 29th, 1872, was that the defendant should have to and including the 6th of May following to procure the return to be filed, and that if it were not filed on or before that day, the appeal *was* to be dismissed with costs. If the return had been filed within the time limited, that would, of course, have put an end to the motion. If it were not, then an affidavit of the fact should have been made, and an order obtained dismissing the appeal for the reason that the defendant had failed to comply with the condition. The order was that the appeal was *to be* dismissed *if* the condition was not complied with, which contemplates that it should, in some way, appear that the return had not been filed, to entitle the appeal to be dismissed.

It has been the practice of this court, as long as I have been in it, and so far as my knowledge extends, the general practice, where a motion is granted unless the other party comply with a certain condition, to present an affidavit *ex parte*, that he has failed to do so, and take a final and absolute order, which is granted by the judge as a matter of course upon the reading of the affidavit. The reason for the practice is that it may be a question whether he has or has not complied; whether what has been done was or was not a compliance with the con-

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dition; for such cases have, within my knowledge, occurred. The taking and entry of an absolute order therefore upon an *ex parte* affidavit, and the service of it upon the other party, advises him formally that the conditional order has become absolute; so that if there be any ground for disputing it, he may move to have it set aside.

The plaintiff did nothing of this kind. The defendant, through no fault of his, was unable to procure the justice's return, as the stenographer's notes could not be found. He might, it is true, have previously moved to attach the justice for contempt, which would have been a somewhat ungracious proceeding, when he knew the real cause of the delay, and probably expected that the notes would be found. On the 6th of May, the last day for the performance of the condition, he obtained an order for the justice to show cause, on the 17th of May following, why he should not be attached for contempt, containing a stay of all proceedings on the part of the plaintiff in the meanwhile, which order was served upon the defendant; who, notwithstanding the stay of proceedings, and while it was pending, issued execution upon the ground that Judge Loew's order took effect upon the 6th of May, as an order dismissing the appeal absolutely.

In this I think he was in error. The order of Judge Loew was conditional. It was not to become absolute unless the defendant failed to comply with the condition, and of this the court should have at least presumptive evidence in the form of an affidavit *ex parte*. The order of Judge Loew, moreover, did not preclude the defendant from applying for further relief upon facts transpiring after that order was made. Upon the facts as they existed at the time of the granting of that order there could be no new or different order, the remedy being by an appeal to the general term. But the order for the justice to show cause why he should not be attached for contempt, was founded upon an affidavit setting forth all that had taken place before Judge Loew, down to and including his order of April 29th, and also that the defendant had applied again to the judge for a return setting forth the facts, and that no return had been made; so that Judge J. F. Daly, in allowing a stay of proceedings

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until that motion could be heard on the 17th, knew all that had occurred before Judge Loew, and having additional facts before him, could give further relief if he thought proper, which he did in part by ordering a stay of proceedings until the hearing of that motion. It appears, by the affidavit of the defendant's attorney, that the conditional order of Judge Loew was not formally entered until after the time prescribed in it had gone by; that is, on the 14th of May, when it was entered by the plaintiffs' attorney, and a copy of it served upon the defendant. This was irregular, for the stay of proceedings was then pending, and equally so the issuing of an execution, upon the assumption that by the entry of that order the appeal was dismissed. A stay of proceedings, even if improperly granted, cannot be disregarded, and the opposite party cannot take any step intermediate the service of the order and the hearing of the motion to show cause upon which it is granted (*Harris v. Clark*, 10 How. Pr. 416; *Warren v. Wendell*, 13 Abb. Pr. 187).

We are referred to the case of *Hoffman v. Tredwell*, 5 Paige, 82. In that case the complainant's bill was dismissed for want of prosecution. On the complainant's application the chancellor made an order vacating the dismissal, upon the payment of the costs of the defendant's solicitor, within a certain period. This order the complainant did not enter, and not having paid the costs upon demand, the defendant's solicitor had the order entered as of the original date, and, upon an affidavit that the terms of the order had not been complied with, he obtained an enrollment of the original order dismissing the bill. Whether a further decretal order was entered upon this affidavit, upon which the enrollment was made; which, under our Revised Statutes, was the attaching together the papers in the cause, and the filing of them by the register (2 Rev. Stat. 181, § 97), does not appear. The chancellor simply states that it was sufficient for the defendant's solicitor, in order to entitle him to proceed upon the order of dismissal, to have made an affidavit stating the terms upon which it was to have been vacated by the decision of the court, and that the complainant had neglected to enter any order upon such decision, or to comply with the terms imposed. Probably, upon the presentation of the affidavit to the register, he enrolled the

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original order which was not, as in this case, a conditional one, but an absolute order dismissing the bill ; for the register was an officer who settled the decrees or decretal order upon a hearing of the parties, unless, at his or their request, the chancellor or vice-chancellor who made the decision was applied to to settle it. The case, however, shows that the decretal order could not have been enrolled without this affidavit, to be submitted either to the register or the chancellor, and without the enrollment no execution or further proceedings could have been had upon or under the decretal order dismissing the bill (Chancery Rules, No. 111). By analogy, therefore, the practice recognized in this case as the correct one, is substantially the same as the practice which, as I have said, has always prevailed in this court.

Order affirmed.

HERMAN LUDWIG *et al.* v. HENRY N. MINOT *et al.*

A suit was commenced in a District Court, in which the plaintiff claimed to recover \$260 and interest. The suit was removed to the Common Pleas, where a judgment was recovered for the full amount claimed. On appeal from that judgment, *Held*, that the fact that not more than \$250 could have been recovered in the District Court, did not render it invalid. When the cause is transferred to this court, it becomes subject to all the general rules of practice and principles of law governing cases of like character as to which this court has original jurisdiction.

APPEAL by defendants from a judgment of this court, entered on the verdict of a jury.

The suit was originally commenced in the 8th District Court, where a summons was issued for \$250, but the amount claimed in the complaint was \$260, besides interest. After issue joined, the cause was removed to this court, where it was tried, and a verdict for the plaintiffs rendered for \$260 and interest.

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John B. Fogerty, for appellants.

David McAdam, for respondents.

BY THE COURT.*—ROBINSON, J.—This action was commenced in the District Court of this city, for the 8th Judicial District, and removed to this court under the provisions of the act of 1857, chap. 344, § 3. The claim in the court below was for sums amounting to \$260 principal, and interest. This was no error if the recovery was limited to \$250, the amount of the jurisdiction of that court. The defendants, having applied for and obtained a removal of the cause to this court have, after trial had, a judgment recovered against them for the full sum of \$260, besides costs; and they, on this appeal, claim not only error in the judgment because the recovery exceeded \$250, but that it was absolutely void for mistrial, because the verdict exceeded the jurisdiction of the District Court. It is apparent from the record, that such recovery was for less than \$250 and interest until verdict.

I am of the opinion there is no such error.

I. Although this court has acquired jurisdiction by appeal from a District Court, where the recovery was limited to \$250, the cause being thus removed, it became subject to all the general rules of practice and principles of law governing cases of like character, as to which this court had original jurisdiction. In the administration of justice, as authorized by its constitutional powers, it has not two courses, one for causes brought into it by due process of removal from inferior courts, and another for those originally commenced therein. The removal of the cause into this court (in which the defendants were the actors) attached to it all the incidents of jurisdiction appertaining to this court—the unrestrained right of the court to declare the rights of the parties upon the case presented, and to give final judgment in accordance with its determination. The appellants refer to no authority for any assimilation of the powers of this court in such a case, to those of the District

* Present, DALY, Ch. J., ROBINSON and LOEW, JJ.

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Court, and the limitations upon its powers, growing out of the consideration that such as it possesses are only those conferred by express provision of law.

II. Had any injustice been done the appellants, this court is not constrained by any such Procrustean views as are suggested by the appellants, nor bound to reverse this judgment, because the verdict and judgment entered thereon exceeded \$250. On such an appeal it may (Code, § 330) “reverse, affirm, or modify the judgment appealed from,” and affirm as to part and reverse as to the residue (*Story v. N. Y. & H. R. R. Co.* 6 N. Y. 86).

Had any injustice been done the appellants (defendants) by the judgment (which is not complained of except upon technical grounds), the modification in accordance with the justice and merits of the transaction might be made.

None such is disclosed, and the judgment should be affirmed.

Judgment affirmed.

JAMES L. LAMB *et al.* v. THE CAMDEN & AMBOY R. R. Co.

Plaintiffs agreed with a common carrier of freight for the transportation of certain bales of cotton at a specified rate of freight. At the time the agreement was made, no bills of lading or shippers' receipts were given by the carrier, but after the goods had been shipped, receipts were sent to the shippers containing a clause exempting the carrier from liability for loss by fire, but this clause was not brought to the notice of the shippers until after the cotton had been destroyed by fire. *Held*, that the carrier was liable for the loss.

APPEAL by defendants from a judgment entered on the verdict of a jury at trial term.

This was the second trial of the cause. On the first trial, the only evidence of the contract under which the goods were carried was the bills of lading. The plaintiffs had a verdict, and the judgment entered thereon was affirmed by this court at general term (reported in 2 Daly, 454), but reversed by the Court of Appeals (reported in 46 N. Y. 271).

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On this trial the plaintiffs had a verdict for \$114,235 42. The facts necessary to an understanding of the points raised on this appeal are stated in the opinion.

Charles F. Sandford, for appellants.

Luther R. Marsh, for respondents.

BY THE COURT.*—ROBINSON, J.—This action was brought to recover from the defendants, common carriers between Philadelphia and New York, the value of 137 bales of cotton belonging to plaintiffs, which (with other property of the plaintiffs) they carried to New York in July, 1864, and before delivery was destroyed by fire. This cotton constituted a portion of 790 bales shipped by plaintiffs in June, 1864, at Cairo, Illinois, with the Illinois Central Railroad Company, for transportation to New York, and was carried by that company to Chicago, and reshipped by them there for New York by "The Union Transportation & Insurance Company," proprietors of the Union line, and by this latter company, on its arrival at Philadelphia, delivered to the defendants, by whom it was carried to New York, where these 137 bales were accidentally burned.

Defendants claim that the cotton was received and carried by them in part performance of a special agreement made by plaintiffs with the Illinois Central Railroad Company, for its transportation from Cairo to New York at the through rate of \$2 per 100 lbs., "upon the express condition that the carriers of the cotton should not be liable for any loss by fire;" that, on the arrival of the cotton in New York, they notified the consignees of its arrival; that the latter neglected to remove this quantity in due season, and it was accidentally consumed by fire, without negligence on the part of the defendants.

On the part of the defendants, bills of lading or shippers' receipts for the 790 bales of cotton, issued as well by the Illinois Central Railroad Company as by the Union line, were produced in evidence, each of which contained an exemption of the company from liability from loss by fire, but it is not shown,

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nor can it be legally claimed upon any of the facts proven, that defendants are not liable for this claim of loss, except by force of the exemption contained in the bills of lading issued by the Illinois Central, under which they allege they received and carried the cotton to New York. Plaintiffs, against defendants' objections, were allowed to introduce evidence tending to establish that the agreement they made with the Illinois Central was verbal, and for the transportation of this cotton to New York by that road, and its connecting roads, at \$2 per 100 lbs.; that such company so agreed to carry it to Chicago, and then forward it "all rail" to New York at that rate of freight; that in this contract no such limitation of responsibility for loss by fire was suggested or agreed upon; that a Mr. Halliday, who had the cotton in charge, for putting it in order, and draying it to the cars, was then instructed, after shipping it, "to take the bills of lading, and forward them to New York," such special authority to the latter being given with the knowledge of the general and local freight agent of the road with whom the contract was made; that the cotton was all delivered to that company under such parol agreement; that plaintiffs then left, and had no knowledge of the nature of the bills of lading subsequently issued, and produced in evidence by the defendants, or of the special exemption clause therein, until after the cotton was burned; that after plaintiffs had left Cairo, and the cotton had been partly shipped on board the cars, and gone forward, a clerk of Mr. Halliday prepared these bills of lading, and had them signed by another clerk of the Illinois Central, and Halliday himself never knew of nor acquiesced in any such exemption clause, and both the general and local agent testify that no such exemption was alluded to when the agreement was made.

The question whether these bills of lading embodied the contract, or were subsequently issued without plaintiffs' acquiescence, or under such action taken by Mr. Halliday or his clerk, as was within any authority conferred by plaintiffs, seems to have been, necessarily and fairly submitted to the jury.

The case of *Bostwick v. The Baltimore & Ohio R. R. Co.* (45 N. Y. 712) has established that the shipper who has

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parted with the control of his goods to the carrier under a verbal agreement for their transportation, is not deprived of any of his common-law rights by subsequently receiving a bill of lading containing special conditions and limitations, to which his attention was not called, and, through inadvertence, they have not come to his knowledge or notice.

The testimony fully warranted the charge and submission of the question to the jury, whether the plaintiffs had ever assented to any such limitations upon their common-law rights. The only plausible ground for contending that they did so arose from what was done by Halliday's clerk, in so far as it can be claimed that what was done by him brought the case within the principles decided in *Nelson v. The Hudson River Railroad Co.* (48 N. Y. 498). In that case the agent was entrusted with the goods to ship, and to *make a contract* for their transportation, and the carrier refused to receive them otherwise than under restrictions and upon the terms of the special contract. This case possesses no such feature. The agreement had been fully made by and with the plaintiffs, and all the agent had to do was to deliver the cotton, and "take bills of lading" in conformity to the precise terms, and send them to New York. The goods had already been accepted under the verbal agreement, and neither Mr. Halliday nor his clerk had any right or authority to make any new bargain, or to accept bills of lading variant from the original contract. Upon the proofs offered, the jury were warranted in finding that these bills of lading were never agreed to or acquiesced in by the plaintiffs, and that the goods were accepted by the Illinois Central for transportation without any modification of their common-law rights or liabilities, except as to the freight and duty to forward the cotton to New York from Chicago by "all rail." The Illinois Central, being without exemption from liability for loss by fire, could confer no such right on the Union line or the defendants, to the prejudice of the plaintiffs. The various rulings of the judge on the trial, and the several propositions of law contained in his charge to the jury, accord with these views, and were liable to no just exception.

Judgment affirmed.

Quinlan v. The Sixth Avenue R. R. Co.

JULIA QUINLAN v. THE SIXTH AVENUE R. R. Co.

Plaintiff while riding in one of the defendants' horse cars was injured in consequence of a runaway team of horses belonging to the defendants running into the rear of the car in which she was sitting. It was proved that the runaway horses had been worked together every day for more than six weeks previous to the accident, had given entire satisfaction, and were considered perfectly safe. It appeared that the driver of them was not in good health, but there was nothing to show that his disease was such a one as prevented him from performing his duties as driver. *Held*, that there was no evidence of negligence on the part of the defendants.

APPEAL by defendants from a judgment entered upon the verdict of a jury.

On the 9th day of April, 1870, the plaintiff entered one of the defendants' cars for the purpose of going down to 48th street, where she lived. A small child belonging to her employer was in her charge at the time, and she took a seat in the rear end of the car, with the child in her arms.

When the car reached the vicinity of 54th street, a runaway team of horses belonging to the defendants ran violently against the rear thereof, shattering the same considerably, and throwing it off the track.

The plaintiff swore that when she saw the team coming she attempted to get to the forward part of the car; that she had only taken a few steps when the collision occurred, and that something struck her in the back of the neck and threw her down. The conductor and driver of the car, on the other hand, swore that she was not thrown down; that the former had his hand on her shoulder supporting her, and that he stood between her and the runaway team at the time of the collision.

The jury found a verdict in favor of the plaintiff for \$4,500, for which sum, together with costs and allowance, amounting in all to \$5,098 05, judgment was entered.

John H. Platt, for appellants.

Culver & Wright, for respondent.

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BY THE COURT.*—LOEW, J.—To maintain her action it was not only necessary for the plaintiff to show that she had received an injury, but she was bound to assume the *onus* of proving affirmatively that the same was caused by reason of the carelessness or negligence of the defendant or its servants (*Deyo v. N. Y. Central R. R. Co.* 34 N. Y. 9).

This proof, we think, she failed to furnish.

The uncontradicted testimony of the defendants' foreman shows that for more than six weeks previous to the accident, the two runaway horses had been worked together every day, had given entire satisfaction, and were considered perfectly safe.

On the occasion in question they had drawn one of the defendant's cars to the upper terminus of the road at Fifty-ninth street, and while the driver was in the act of bringing them round from the upper to the lower end of the car, they, from some unexplained cause, suddenly took fright, reared and plunged, and finally broke away from him, and dashed down the avenue.

At the time when the horses became frightened, the driver held the reins in one hand, and a hook with which he carried the whiffletree in the other, as is usual when horses are detached from one end of the car and brought around for the purpose of being attached to the other end. Nevertheless, it seems from the evidence that so far from being negligent, he did all that he could under the circumstances to prevent the horses from running away.

Mr. Vanderbilt, one of the plaintiff's witnesses, in answer to a question put to him by her counsel, testified, "He (the driver) was endeavoring to keep the horses from running away;" and the conductor of the car, from which the team ran away, testified on the part of the plaintiff as follows: "I think the near horse started to run, and I don't think four men could hold a runaway horse when he starts. * * * He tried to hold them. A man cannot hold a team when he is standing on the street." And in answer to a question asked him by

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plaintiff's counsel, as to whether the driver could not have stopped the horses if he had held the lines with both hands, he said, "I don't believe he or any one else could have held them."

There was not, therefore, even upon the plaintiff's own showing, any question of negligence on the part of the driver to submit to the jury.

It is claimed, however, that the driver was sick at the time alluded to, and that the company was guilty of negligence in employing such a person.

Mr. Whitehead, the conductor, certainly did testify that the driver was sick, and that he took him to Dr. Bradley; but he also swore, in answer to another question, that he could not say that he was a well man, nor yet a sick one. His evidence upon that subject was, therefore, to say the least, very unsatisfactory.

Assuming, however, that it was sufficient to justify the jury in finding that the driver was sick, in the face of the evidence given on the part of the defendant, showing that he was not, still, that fact unsupported by other evidence, did not authorize a finding that the defendant was guilty of negligence, nor warrant a judgment in favor of the plaintiff.

There is not a particle of evidence in the case tending to show the nature of his illness, and for aught we know to the contrary, he may have had some disease which did not in the least impair his constitution or affect his usefulness as a driver.

If he was afflicted with any disease which rendered him in any degree unfit or incompetent to drive or manage a team of horses, that fact should have been proved, and not left to mere inference and conjecture.

Some such proof was requisite to warrant the jury in finding that the company was negligent in employing him as a driver. As was said by Williams, J., in *Toomey v. Railway Co.* (91 Com. Law Rep. 146), "a scintilla of evidence or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury. There must be evidence upon which they might reasonably and properly conclude that there was negligence."

These remarks were approved by the Court of Appeals, in *Deyo v. Central R. R.* (*supra*), and dispose of this point.

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This is doubtless a hard case. The plaintiff, a poor girl, by this accident, sustained an injury of the spine, by reason of which she was sick and disabled from doing any work from the day of the occurrence down to the time of the trial, a period of two years, and according to the testimony of her physicians she will in all probability never recover.

But it must be borne in mind that the same rules of law are applicable to the poor and rich alike; and however much we may sympathize with the plaintiff in her misfortune, we cannot permit our sympathy to influence our judgment, even though the defendant be a corporation.

In our opinion there was no evidence of negligence on the part of the defendant or its servants to warrant the submitting of that question to the jury, and the motion for a nonsuit made on that ground should have been granted, if not at the close of the plaintiff's case, at all events when the same was renewed after both parties had rested.

The judgment should therefore be reversed, and a new trial ordered with costs to abide event.

Judgment reversed.

SILVIUS LANDSBERG v. WILLIAM B. DINSMORE, PRESIDENT OF
THE ADAMS EXPRESS CO.

A package of goods was received for transportation by an express company, who were to collect the price of the goods from the consignee. On the receipt given by the company for the goods was a clause relieving the company from liability from loss by fire, unless it occurred by their fraud or gross negligence, and another clause providing that in case any sum of money, besides the charge for transportation, was to be collected from the consignee, and the same was not paid within thirty days, the company might return the goods to the consignor, and that the liability of the company for the goods while in its possession for the purpose of making such collection, should be that of warehousemen only. The package was directed to A., in the care of B. When it arrived at its destination, B. refused to receive it, and the company stored it at its warehouse, where thirty-nine days afterward it was destroyed by fire, without any imputation of fraud or negligence on the part of the company, and before any notice had been sent to the plaintiff that B. had refused the package. *Held*, the company were not liable for the loss.

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APPEAL by plaintiff from a judgment of the Sixth District Court, dismissing the complaint.

The action was brought to recover the value of a package of jewelry which was delivered to the defendants by the plaintiff, on the 16th day of November, 1870, for the purpose of being carried to Richmond, Va., and there delivered to one J. L. Swift, care of Glazebrook & Thomas, on payment of the price of the goods.

On the receipt given by the company for the goods was printed the following clause: "It is part of the consideration of this contract, and it is agreed, that the said express company are forwarders only, and are not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company entrusted, or arising from the dangers of railroads, ocean, or river navigation, steam, fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants."

The receipt also contained this clause: "If any sum of money, besides the charge for transportation, is to be collected from the consignee on delivery of the above described property, and the same is not paid within thirty days from the date hereof, the shipper agrees that this company may return said property to him at the expiration of that time, subject to the conditions of this receipt, and that he will pay the charges for transportation both ways, and that the liability of this company for such property, while in its possession for the purpose of making such collection, shall be that of warehousemen only."

On the 17th day of November the package was received at the Richmond office of the defendants, and on the same day it was taken by defendants' driver to the store of Glazebrook & Thomas, who declined to receive the same, whereupon it was taken back to the express office and there stored in a room set apart for packages which could not be delivered.

The upper part of the building in which the Adams Express Company offices were situated was used as a hotel, called the

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"Spotswood Hotel," and on the 25th day of December, 1870, a fire originated in one of the rooms of said hotel, whereby the whole building was consumed, and the package in question, with other property, destroyed.

The justice rendered judgment dismissing the plaintiff's complaint, and he thereupon appealed to this court.

J. H. & B. F. Watson, for appellant.

Blatchford, Seward, Griswold, & Da Costa, for respondents.

LOEW, J.—An express company is a common carrier, and as such may limit its common-law duties and liabilities by express contract, and the delivery and acceptance of a bill of lading containing restrictive clauses and conditions will, in general, create a special contract, which will bind the respective parties thereto (*Prentice v. Decker*, 49 Barb. 21; *Blossom v. Dodd*, 43 N. Y. 264, 269; *Steinway v. The Erie R. R.* Id. 123).

The receipt or bill of lading which was offered in evidence by the plaintiff, and formed the contract between the parties in this case, contained a clause that the defendant should not be held liable or responsible for any loss or damage to the property in question arising from fire, etc., or from any other cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of the defendant, or its servants.

To maintain his action, the plaintiff was therefore bound to assume the burden of proving that the loss was caused by reason of the fraud or gross negligence of the defendant, or its servants (*French v. Buffalo, &c. R. R.* 2 Abb. Ct. App. Dec. 196; s. c. 4 Keyes, 108; *Lamb v. Camden & Amboy R. R.* 46 N. Y. 271).

It is conceded that as regards the fire, there was no fault or negligence on the part of the express company or its servants, but it is urged that the defendant was bound to give the plaintiff notice that Glazebrook & Thomas had declined to receive the package, and its failure to do so made it liable.

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Ordinarily if, as in this case, the shipper has disclosed his name and address, I incline to the opinion that it would be the duty of the carrier to notify him within a reasonable time of the refusal of the consignee to receive the goods. But here it is expressly conceded on the points of the plaintiff's counsel, that by the terms of the bill of lading, the company was authorized, if not obliged, to keep the package for thirty days, for the purpose of collecting the price of the goods. Moreover, the evidence shows that when the defendant's driver offered the package to Glazebrook & Thomas and demanded payment therefor, they refused to receive or pay for the same, not because Swift did not want the goods, but on the ground that he was already indebted to them, and they did not care to advance any more money for him until he had paid them. They also said that Swift would be in town in a few days, and at the driver's request promised to notify him of the fact that the package had arrived, and was at the company's office. Under these circumstances the defendant, to say the least, had good reason to believe that the goods would be called for by Swift within the thirty days, and as there was, therefore, nothing of importance to communicate to the consignor, I am of the opinion that it was not incumbent on the company to send him notice (*Weed v. Barney*, 45 N. Y. 344, 347). I also think that the defendants did all that could be reasonably asked or required of them in regard to the delivery of the package. Swift did not reside in Richmond, and Glazebrook & Thomas, to whose care the same was directed, were the only persons to whom the company was bound to tender it, and they having refused to accept it, the defendant was justified in retaining the possession thereof until Swift should call for it. After the refusal of Glazebrook & Thomas to accept the goods, the liability of the company, while the same remained in its possession, was by a stipulation in the bill of lading limited to that of warehousemen only. Indeed, such and such only would have been its liability, independent of its stipulation on the subject (*Fenner v. Buffalo & State Line R. R.* 44 N. Y. 505; *Weed v. Barney*, *supra*.)

It is, however, insisted that inasmuch as the defendant *was*

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authorized by the bill of lading to retain the goods for thirty days for the purpose of making the collection, there was an implied contract on its part to return them at the expiration of that time. I can perceive no such obligation, but assuming this to be so, still I do not think that it would make the defendant liable. Surely, the mere fact that the defendant failed to return the package within the nine days, intermediate the expiration of the thirty days and the occurrence of the fire, would not warrant us in holding, as matter of law, that the company was guilty of either *fraud* or *gross negligence*, for which only it is by the terms of the special contract liable or responsible.

In my opinion, the judgment of the court below is correct and should be affirmed.

ROBINSON, J., concurred.

DALY, CH. J.—I agree that the judgment should be affirmed.
Judgment affirmed.

PHILIP DIAMOND v. THE WILLIAMSBURGH INSURANCE COMPANY.

The court may, under the Code, at any time before trial, allow a defendant to amend his answer by setting up a new defense.

The case of *Woodruff v. Dickie* (5 Robt. 619; 31 How. Pr. 164), holding the contrary, *Held* to have been erroneously decided.

The nature of the power which the court had at common law, to allow amendments investigated, the enlargement of it by statutes and judicial decisions, examined, and the cases reviewed.

It is not indispensable that there should be something to amend by, for an amendment is not solely the correction of an error in a pleading already before the court, but may consist in the withdrawal of it, and the substitution of a new and different defense.

SPECIAL TERM, November, 1873.

THE defendant moved, at the Special Term, to amend his answer by setting up a new and additional defense. The plaintiff insisted that the court had no power to allow it, and relied upon the decision of the general term of the Superior Court, in the case of *Woodruff v. Dickie* (31 How. Pr. 164; 5 Robt. 619).

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L. K. Miller, for the motion.

A. S. Sanger, opposed.

DALY, CH. J.—I entertain no doubt of the power of the court to allow a defendant to amend his answer before trial, by setting up an additional defense, if it be in furtherance of justice. Under the old practice, a plaintiff would not be allowed to amend his declaration if the amendment would change the nature of the action (*Cope v. Marshall*, Sayre, 234; *Duchess of Marlborough v. Wiginan*, Fitzg. 193). But the rule was not so strict in respect to amending pleas, or adding a new and different plea as a defense to the action, the reason given being that the plaintiff, if he has misconceived the form or nature of his action, can discontinue and bring a new action; whereas the defendant must avail himself of his defense in the action brought against him (*Waters v. Bovill*, 1 Wils. 223; *Cope v. Marshall*, Sayre, 234). The defendant would, therefore, be allowed to amend his pleading at a stage of the case when the plaintiff would not be allowed to amend his declaration (*Waters v. Bovill*, *supra*; *Skeet v. Woodward*, 1 H. Bl. 238), and to amend by setting up a new defense (*Dryden v. Langley*, Barnes, 22; *Prior v. Duke of Buckingham*, 8 Moore, 584; *Hubert v. Steiner*, 4 Moore & S. 228). The code has not changed the law in this respect. Its provisions, in relation to the amendment of pleadings, were designed to be more broad and liberal even than the former practice. The codifiers say, in respect to this very section authorizing the amendment of pleadings and proceedings (then § 149), that their object was (I use their own language) “to provide a means of amendment of the most liberal character; *as liberal, indeed, as we could devise*” (First Report of Commissioners, 1848, p. 158).

It was held by the Superior Court, in *Woodruff v. Dickie* (31 How. Pr. 164; 5 Robt. 619, Chief Justice Barbour dissenting), that under the code the court has no power to allow, by amendment, the insertion of a new or different cause of action *or defense*. Judge Monell, who delivered the prevailing opinion, says, that neither at common law, nor under any of the

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previous statutes, was such a power ever claimed; and the decision of the special term was affirmed upon the ground that the court had no power to allow a defendant to amend his answer by setting up a new defense.

With all due respect for the very able court by whom this decision was rendered, I think the conclusion arrived at was erroneous. The four authorities cited in support of it are, with one exception, cases in which the plaintiff applied to amend his declaration by setting up a new cause of action, and are in accordance with the old practice, as I have previously stated it; that an amendment of a declaration would not be allowed where it would change the nature of the action. In *Sacket v. Thompson* (2 John. R. 207), the plaintiff asked to substitute for the existing count in the declaration a new count; or if that was not thought proper, to add two other counts. It is not shown in the report what the effect of the proposed counts would have been; but it may be inferred from the remarks of the court, that they amounted to setting up a new cause of action. The application was refused, not only upon this ground, but because it was too late for the plaintiff to apply for an amendment of his declaration; the old practice being that an amendment, amounting to a new count, was not permitted after two terms of the court had elapsed. In the next case cited, *Heneshoff v. Miller* (Id. 294), the amendment was allowed, as it did not change the nature of the action. In the next case, *Williams v. Cooper* (1 Hill, 637), which was an action for slander, the defamatory charge was that the defendant had stolen *apples*, and the amendment asked was to add words which imported that he had stolen *boards*. This was regarded as adding a distinct, substantive cause of action, not known to the plaintiff when the suit was brought, and, of course, not intended to be declared upon. But, in addition to this, the defamatory charge sought to be added was, when the application was made, barred by the statute of limitations, and to have allowed it then to be incorporated in the declaration by an amendment, would have been to avoid the effect of the statute. In that very case, moreover, it appeared that the defendant had been allowed, after pleading the general issue, to amend, by

adding a plea of justification, the plaintiff at the same time applying to amend his declaration; so that the case shows that the defendant was allowed to set up a new and different defense, whilst the plaintiff was not permitted to set up a new cause of action, thus recognizing the distinction to which I have previously referred. In the last case cited, *Trinder v. Durant* (5 Wend. 72), the defendant applied to amend a plea in abatement, not by setting up a new defense, but to perfect his plea by adding some additional names of persons jointly liable that had been omitted, and by striking out the names of others that had been erroneously inserted; which application was refused, because a plea in abatement being a dilatory plea was not at common law amendable, and the court thought that the provision in the Revised Statutes did not apply, as the amendment of 'such pleas, in the language of the statutes, was not "in furtherance of justice." There is, therefore, nothing in the authorities warranting the conclusion that an answer cannot be amended by setting up a new and different defense; whilst in the following cases, decided both before and since the code, the defendant, after issue joined, was allowed to amend, not only by varying an existing defense, but by setting up a new defense (*Dryden v. Langley*, Barnes, 22; *Prior v. The Duke of Buckingham*, 8 Moore, 584; *Hubert v. Steiner*, 4 Moore & Scott, 328; *Beardsley v. Storer*, 7 How. Pr. 294; *Harrington v. Slade*, 22 Barb. 161; *McQueen v. Babcock*, 13 Abb. Pr. 268; *Van Ness v. Bush*, 22 How. Pr. 491; *Union National Bank of Troy v. Bassett*, 3 Abb. Pr. N. S. 359; *Ford v. Ford*, 53 Barb. 526).

Judge Monell in his opinion in this case of *Woodruff v. Dickie* says that an amendment is the correction of an error or mistake in a pleading already before the court; that there must be something to amend by, and that the insertion of facts constituting a new cause of action or defence, is a *substituted* pleading and not an amendment. This is a very narrow definition of an amendment, and is not warranted either by the etymology of the word, nor by the practice respecting amendments, as it has existed from the earliest period.

Originally at the common law all pleadings were oral at

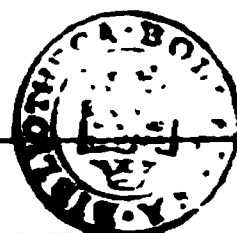
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the bar of the court, and were amendable for defects of *form* or substance at any time before they were recorded by the judges as the foundation for their judgments (*Garner v. Anderson*, 1 Str. 11; Gilbert's Common Pleas, CX.), which was any time during the term, and by a statute subsequently passed (14 Edw. III), it might be allowed during the next term. To use the language of the court in *Rush v. Seymour* (10 Mod. 88), "If any error were spied in them, it was presently amended;" that is before the roll of that term was made up, or engrossed as the final record of its proceedings (Blackmore's Case, 8 Co. 157); for, says Coke in the case cited, "during the term the record is in the breast of the court, and not in the roll;" or as the practice is more distinctly set forth in an anonymous case in 3 Salk. 31, in which it was ruled that "whilst the declaration is *in paper*, the court may give leave to amend anything in it at pleasure," and "during the term might amend any mistake in the roll at common law; the roll being only the remembrance of the court during the term." But that "after the term, the court could not amend any fault in the roll, for then the record is not in the breast of the court, but in the roll itself." When the record for the term was made up, it could not, by the common law, under heavy penalties, be altered, erased, or amended, even by the judges, unless they were specially authorized to do so, that power resting exclusively in the king and his council (Britton, B. I, c. 1, § 11). When the custom of oral pleading ceased, and all pleadings were required to be in writing, a motion to amend the pleading succeeded to the former practice. This motion, it is said in *Rush v. Seymour*, *supra*, "the court cannot refuse whilst the pleadings are in paper;" that is, before they were entered of record; but the same authority states that the court has a discretion, and may refuse, if the party applying for the amendment refuse to pay costs, or the amendment amount to a new plea, the word plea being here used in its generic sense, as applicable to the pleading of either party. The course of procedure after this change was made, and the nature of it, is thus explained by Chief Justice Parker, in *Garner v. Anderson*, Str. 11: "The foundation of amendments by the court whilst the

proceedings remain in paper, before they be recorded is, that these papers delivered to and fro, supply the declaring and pleading *ore tenus* at the bar, and may be amended *as easily as spoke at the bar.*”

The pleadings were “in paper” until the record or rolls for the trial were made up, engrossed, sealed at the Nisi Prius office and docketed (1 Clerk’s Inst. 153; 2 Tidd’s Pr. 728, 9th ed.)

Up to this time, the engrossment and sealing of the plea and issue rolls, the greatest liberality appears to have prevailed in allowing amendments, especially on the part of the defendant, except where he had interposed a dilatory plea, such as a plea in abatement (*Lepara v. German*, 1 Salk. 50), or where by pleading defectively and compelling the plaintiff to demur, the plaintiff had lost a trial (*Jordan v. Twells*, Cases Temp. Hard. 171). The power was not limited, as Judge Monell supposes, simply to a correction of an error or mistake in a pleading already before the court. Baron Gilbert, the very highest authority on such a subject, says that it was debated amongst the judges at Sergeant’s Inn whether a plaintiff could amend his declaration after the defendant demurred and the plaintiff had joined in demurrer, and he says that their conclusion was that he could, if the cause were still in paper, on payment of costs, liberty being given to the defendant to change his plea; and he gives the reason as follows: “Because the pleading in paper came in only instead of the antient way of pleading *ore tenus*; and in the pleading *ore tenus* the record was only in *feri*; and therefore though a man had joined in demurrer, he might come before that was entered on record and pray to *withdraw his demurrer* and amend; but after the pleadings were entered on record of the same term, then it could not be altered or amended” (Gilbert’s Common Pleas, pp. 114, 115). That this was the practice appears still more conclusively from a case in 2 Salk. R. 520, in which it is said: “Since pleading in paper is now introduced instead of the old way of pleading *ore tenus* at the bar, it is but reasonable after a plea to issue or demurrer joined, that, upon payment of costs, the parties should have liberty to amend their plea, or to *waive*



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their plea, or demurrer, while all proceedings are in paper." If a party therefore may waive his plea, it is something more than correcting an error or mistake in a plea already before the court. It is what Judge Monell thinks cannot be done, for he says a pleading containing a new defense "is a substituted pleading and not an amendment," but if, as these early authorities show, either a plaintiff or defendant will be allowed to amend after his pleading is demurred to, by substituting either another declaration or another plea, it is very clear that Judge Monell's impression of the practice was erroneous.

In *Prussett v. Martin* (Gilb. C. P. 113), the plaintiff was allowed to amend by filing a new bill, although there was nothing to amend by; and in the cases already cited (*Waters v. Bovill*, 1 Wils. 223; *Dryden v. Langley*, Barnes, 22; *Prior v. The Duke of Buckingham*, 8 Moore, 584; and *Herbert v. Steiner*, 4 Moo. & Scott, 328), the defendants were allowed to add additional pleadings, setting up separate and distinct defenses.

The word "to amend" has not and never had, either etymologically or legally, such a restricted sense as the learned judge puts upon it. It came into our language from the French "*amender*," the root or parent word being *menda*, a fault, and means in its most comprehensive sense "*to better*." It is so defined by all the leading lexicographers. Thus in Phillip's New World of Words, and in Kersey and in Bailey, one of the definitions, is "*to make better*;" by Johnson "*to change from bad for the better*;" by Webster "*to change in any way for the better* * * by *substituting* something else in the place of what is removed." As a law term, the simple definition of amendment given by Rastall, Cowell or Blount, our earliest expositors of law terms, is the espying out of some error in the proceedings and the correcting of it before judgment and after, if the error be not in the giving of the judgment, the remedy in that case being by writ of error. When, therefore, a defendant is allowed to withdraw a plea or answer, because it does not set up the defense which he has, and put in its stead a plea or answer which does, it is a change for the better, and is therefore an amendment as defined by the lexicographers;

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nor is the statement correct that an amendment can be allowed only where there is something to amend by, for amendments have been allowed where that objection existed and the point was expressly taken (*Carr v. Shaw*, 7 Term R. 299; *Rutherford v. Mein*, 2 Smith, K. B. 392; Gilbert's Com. Pleas, p. 116, 3d ed.). Under the various statutes of jeofails, enacted to relieve the prevailing party, notwithstanding certain omissions or defects in the record, the general rule was that there must be something in the record to amend by or to enable the statute to take effect, and yet, notwithstanding this general rule, Tidd says and quotes the cases in support of his statement, that the courts have in particular instances, permitted the plaintiff to amend his declaration after issue joined, in cases where there was nothing to amend by (Tidd's Practice, p. 713, 9th Lond. ed.). In respect to the plaintiff's right of amendment, the courts did impose some restriction, even while the pleadings were in paper, for the reason already stated, that the plaintiff can sue again. Thus he would not be allowed to amend his declaration after two terms had elapsed, because if he had not declared within that time, the cause would have been out of court, and having declared defectively they gave the defendant the benefit of the time that had elapsed, treating the amendment as equivalent to a new declaration. For this reason the plaintiff in such a case was left to sue over again. But this reason did not apply to pleas, which Tidd says "may be amended at any time as long as they are in paper" (1 Tidd, p. 708). Nor would they allow an amendment changing the nature of the action; but would, for the same general reason, leave the plaintiff to bring another action. But even these rules were not strictly adhered to; for if the statute of limitations would be a bar to a new action, they would allow the amendment upon terms; and the restriction that the plaintiff would not be allowed to amend after two terms had elapsed was in course of time greatly relaxed in practice (*Bearcroft v. The Hundred, &c.* 3 Lev. 347; *Duchess of Marlborough v. Wignian*, Fitzg. 198; *Cope v. Marshall*, Sayre, 234; *Freen v. Cooper*, 6 Taunt. 358; *Horston v. Shilston*, 6 Moore, 490; *Garway v. Stevens*, Barnes, 19; Tidd's Practice, pp. 697, 698).

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But I nowhere find, except where he pleaded matter in abatement, or defectively for the purpose of delay, that any restriction was ever placed upon the defendant's right to apply for an amendment of his pleading whilst the pleadings were in paper, whether it related to his setting up an additional defense or not, and it would be very unjust if it were so; for as I have said, he must avail himself of his defense if he have any, in the action brought against him, and the reason given in the plaintiff's case that he may sue again is in no way applicable to the defendant's case. When the pleadings were made up in the form of a record, the practice was more strict; but even then amendments would be allowed in the discretion of the court, if there were anything to amend by (Barnes, 3, 7, 10; 2 Clerks' Instruction, 206, 207); for then an amendment involved an erasure or alteration of what was on record, for the plea and the issue rolls were carefully engrossed, sealed and docketed with the clerk, as was also the *Nisi Prius* record; the latter being in the nature of a commission to the judges for the trial of the issue which was also sealed and entered, forming with the rolls, when all this was done, a portion of the record in the cause. This was the practice formerly in this State (Wyches' Practice, 146; Caines' Practice, 502); but it has long since been abrogated. Under the code the clerk, after entering judgment, simply attaches all the necessary papers together and files them as the judgment roll in the cause; so that until the clerk enters the judgment the pleadings are with us, to use the English term, still "in paper." Up to this time, or rather up to the time of the trial, no inconvenience to the court can arise from allowing them to be amended upon terms, and any reasons which may have heretofore existed under the early practice in this State and in England for restricting the power of amendment, upon the ground that the rolls had become a part of the record, are no longer of any force, as there is now no such course of procedure.

The courts were at first very strict in permitting amendments of anything that had taken the form of a record, for records in England were made up with great formality, and much importance was attached to their being preserved without

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change or erasure. At first, they were not allowed to be altered at all, then only for mistakes made by the clerks; but afterwards, as was said, "in furtherance of justice and to obtain right between the parties," the amendment of them was greatly extended (*The King v. Ellames*, Cases Temp. Hardw. 48). Lord Hardwicke says, in *Jordan v. Twells* (Cases Temp. Hardw. 171), "Formerly in all amendments the party was to show that the proceedings were all in paper, though *of late* that has been got over." And finally, the power was so much extended, that in *The King v. The Mayor, &c. of Grampond* (7 Term. R. 703), Lord Kenyon says, that where the defect does not come under any of the statutes of jeofails, but the allowance is made under the general authority of the court, *each particular case must be left to the discretion of the court*. He reiterates the wish expressed by Lord Hardwicke, that "these amendments were reduceable to some certain rules," which he considers equivalent to declaring that there are none, and he then says that the best principle seems to be that on which Lord Hardwicke relied, "that an amendment shall or shall not be permitted to be made as it will best tend to the furtherance of justice." This is brushing away all previous distinctions, and prescribing as the only criterion that which is adopted in the Revised Statutes, that "the court in which any action is pending shall have power to amend any process, pleading, or proceeding, either in *form* or *substance*, for the furtherance of justice, upon such terms as shall be just" (2 Rev. Stat. 424, § 1). This was certainly broad and comprehensive enough to include all cases. It was limited, however, to amendments before judgment, and the codifiers evidently meant to make it more comprehensive, so as to embrace, also, all cases after judgment. They thought they had done so, and as they expressed it, that the provision they had made would be an answer to that class of objectors who asserted that the pleadings they had proposed would prevent a party from proving the real state of his case when it was *imperfectly known to him at the commencement of the action, or imperfectly explained to his counsel* (Report of 1848, p. 158). Their confidence has not been justified by the results of their work. If they had used the words of the Re-

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vised Statutes, simply extending the provision therein to cases after judgment, there would have been no difficulty. But they unnecessarily particularized what amendments should be allowed, and by doing so raised a doubt as to the extent or limit of the power. The general provision, however, in § 173, that the court, in furtherance of justice and upon such terms as may be proper, may "*correct a mistake in any other respect,*" in any process, pleading, or proceeding either *before* or *after* judgment, is, in my opinion, broad enough to give the court all the power which existed under the Revised Statutes, and to extend it to cases after as well as before judgment. There is no restriction in the Revised Statutes as to the nature of the amendment, if the court think it is in furtherance of justice; nor any beyond this, in the code, except that the pleading or proceeding cannot be conformed to the facts proved, if it will substantially change the claim or defense. Under either the Revised Statutes or the code, there is no doubt in my mind of the power of the court to allow an amendment setting up a new or different defense at any time before trial, if it be in furtherance of justice.

There is nothing connected with our system of legal procedure that was more wise in its institution, or which has proved more beneficent in its effects, than the extensive power conferred upon the courts to allow amendments; or, after certain stages in the proceeding, to disregard mere technical defects. A due regard to form is essential to the methodical administration of any system of jurisprudence, which is in no way impaired by a liberal policy in permitting amendments, or, where it can be done, by overlooking technical errors or omissions which do not affect the merits. By a too rigid adherence to forms, in refusing to allow those errors and mistakes to be corrected which are incident to the conduct of all human affairs, legal tribunals evince an unenlightened spirit, and breed a race of technical lawyers who do not aid, but obstruct the administration of justice, by the exercise of their acuteness in detecting defects whereby they may defeat a just cause of action, or prevent an honest defense. The numerous statutes of jeofails, enacted from the reign of Edw. III to that of Geo. I, over

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a period of four centuries, are but so many monuments of the wisdom of the Legislature in interposing to prevent lawyers from defeating the ends of justice by relying upon some technical defect or omission in the proceeding; and a large portion of the litigation covering this period, as will occur to any one familiar with the early reports, has turned more upon questions arising out of the form of the pleadings, or some other technical point, than the substantial justice of the case. The growth of this kind of litigation was due, in no inconsiderable degree, to the technical disposition of the courts, and we owe it to some eminent judges, conspicuous among whom was Lord Hardwicke, that a wiser and better policy has since prevailed. We have sought in this State, by our legislation, to carry out and extend this policy, and our courts will but conform to the design of the Legislature by interpreting its provisions as meant, not to restrict, but to facilitate in a still greater degree, the allowance of amendments.

I might have disposed of the objection raised upon this motion by simply referring to two cases in the Supreme Court (*Union National Bank of Troy v. Bassett*, 3 Abb. Pr. N. S. 359; *Ford v. Ford*, 53 Barb. 526),* which have been decided since *Woodruff v. Dickie*, in both of which the court refused to follow the decision of the Superior Court in that case. But I have gone into this extended examination because this question of the amendment of pleadings is one of great importance, in which it is very material that the courts should not go backward under an erroneous impression of the former state of the law, and upon that error give to the provision in the code a narrow and very limited construction.

In the present case, the defendant's attorney swears that he had supposed that under his general denial he would be able to set up as a defense that the plaintiff had forfeited the policy by the breach of the covenant respecting additional insurance; but that he is now advised by counsel that that is very doubtful, and that, to put it beyond question, it is safer to set up that defense specifically in the answer. It is upon this ground that an amendment of the answer is asked for. The application is a reason-

* And see *McQueen v. Babcock*, 3 Keyes, 428.

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able one, and ought to be granted. It will involve the service of a new answer, and as the plaintiff has already been put to great delay in the time consumed in the examination of witnesses out of the State upon commissions, it will have to be upon the payment of such costs as may have accrued since the former answer was put in.

Motion granted.

JAMES E. COULTER v. HENRY MURRAY *et al.*

A police justice of the city of New York, elected in pursuance of the act of April 28, 1869 (Laws of 1869, chap. 377), is not a constitutional officer within the meaning of the Constitution of 1846, and the Legislature had the power to abolish the office held thereunder, or abridge the tenure thereof.

The act passed May 17, 1873, entitled "An act to secure better administration in the Police Courts of the city of New York," is a sufficient authority for the dissolution of an injunction obtained to prevent the justices appointed thereunder from taking possession and exercising the functions of their office; and to this extent, said act must be held to be constitutional.

SPECIAL TERM, *November*, 1873.

APPLICATION for a permanent injunction.

The facts are stated in the opinion.

Elbridge T. Gerry, for plaintiff.

John K. Porter, Dorman B. Eaton, Nelson J. Waterbury, & James M. Smith, for defendants.

LARREMORE, J.—It is alleged in the complaint in this action that at a general election held in the city of New York, December 7, 1869, the plaintiff was elected to the office of police justice for the Seventh Judicial District of said city for the term of six years from January 1, 1870, of which election a certificate in due form was issued by the proper authorities; that on the day last named he took the oath of office, and entered upon the discharge of his duties as such police justice, and has ever since continued to discharge the same; that he is entitled to the emoluments thereof, and to hold and possess the

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books and papers belonging thereto ; that on February 11, 1870, the Attorney-General, in the name of the people of the State of New York, upon the relation of the defendant Murray, did commence an action in the nature of a *quo warranto* to try plaintiff's title to said office, to which it was therein alleged said Murray was elected and entitled ; that issue was joined therein, and said proceeding is still pending. It is further alleged that the defendants have unlawfully confederated and conspired together to interrupt the plaintiff in the performance of the duties of his said office, and oust him therefrom on November 4, 1873 ; that defendants have openly threatened to do so by force and violence, as well as to institute a prosecution against him in case he should refuse to deliver possession of said office on demand thereof by the defendants ; that they did secretly assemble at a time and place stated, and did then and there unlawfully conspire and agree, and did designate the defendant Murray as the person in whose name and under whose direction the wrongs and violence apprehended and complained of should be done.

The plaintiff then asks the judgment of the court that the defendants, individually and collectively, their attorneys and agents, be enjoined from doing, or causing to be done, any of said acts, or from interrupting or embarrassing him in the exercise of the duties of his said office until the expiration of the term thereof, or until final judgment shall be rendered against him in said action of *quo warranto* ; and that they be further enjoined from intruding on him in said office, or from making any demand for the books and papers belonging thereto, or from instituting any proceeding for the recovery thereof, otherwise than by an action of *quo warranto*.

The question might here be raised, whether, upon the facts stated, a criminal conspiracy has not been established for which the law has provided an adequate remedy, and for the prevention of which a court of equity would refuse to interfere.

But the affidavits of the defendants, read in opposition to this application, explain and define the real position of the parties to this contest.

The defendants allege that on May 17, 1873, an act was

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passed by the Legislature of this State, entitled "An act to secure better administration in the Police Courts of the city of New York" (Laws of 1873, chap. 538), providing for the appointment of police justices in said city, and abolishing all existing provisions of law for the election of such officers; that in said act it is further provided that when appointments of police justices shall have been made as therein prescribed, all the powers, authority and duty appertaining to any police justice in said city, or which might appertain to any such justice then in office, under laws theretofore existing, should belong to and be exercised and performed by the police justices appointed thereunder; that at the time when the justices so to be appointed shall acquire the powers aforesaid, the tenure, salaries and authority of the police justices theretofore existing in said city should cease and determine; that the officers last named are by said act required to deliver all the papers, documents and records appertaining to their said office, to such new police justices, who are authorized to continue and complete any pending inquiry, action, and proceeding in the police courts or special sessions.

The defendants further allege that, in pursuance of said act of May 17, 1873, they have been duly appointed and commissioned as police justices of the city of New York, and they severally deny that plaintiff is a police justice of said city, or that he has any right to said office. The equities are thus as broadly denied as though an answer had been interposed (*Perkins v. Warren*, 6 How. 341). The plaintiff has not traversed the statement of the defendants as to their appointment under such act, but insists that the same, as to him, is unconstitutional and void.

The decisive question in this case has a direct relation to the character of the office which plaintiff seeks to retain, viz.: Is a police justice of the city of New York a constitutional officer, within the purview and meaning of the Constitution of 1846?

It is therein provided that, "All judicial officers of cities and villages, and all such judicial officers as may be created therein by law, shall be elected at such times and in such man-

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ner as the Legislature may direct " (article 6, sec. 18, Constitution of 1846).

When the convention met to frame said instrument, there existed, in the city of New York, two classes of justices of inferior jurisdiction, viz.: special justices and assistant justices, appointed by the common council of said city. In the organization of inferior tribunals by said convention, the said special and assistant justices were excepted, and their subsequent jurisdiction and continuance left to the action of the law (see Debates in Constitutional Convention, 1846, pp. 818, 820).

Thus, from being permanent officers, as they were under the Constitution of 1822 (art. 4, section 14), they were left as appointive officers by the Constitution of 1846, subject to legislative action. Such action was taken March 30, 1848, whereby the terms of said officers were abridged, and the offices held by them abolished.

By an act passed March 30, 1848, entitled "An act in relation to justices and Police Courts in the city of New York" (Laws of 1848, chap. 153), said city was divided into six judicial districts, in each of which it was directed that one police justice should be elected for the term of four years, and who should have all the powers and perform all the duties of the special justices for preserving the peace in said city, which last-named office was thereby abolished.

This (so far as I have been able to find) is the first statutory mention of the office of police justice for said city.

It is a new and distinct office, not in existence when the Constitution of 1846 took effect, but was established in pursuance of its provisions.

Subsequent legislation increased the number of judicial districts in said city, and on April 28, 1869, an act was passed, defining the seventh judicial district of said city, and providing for the election of a police justice therein, who should hold office for six years from January 1, 1870 (Laws of 1869, chap. 377).

Under this act plaintiff claims to have been elected to office, and that he is entitled to hold the same until the expiration of

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the term prescribed therein. Such claim has no legal foundation, so far as it affects this application.

If he had been in possession of a constitutional office on January, 1, 1870 (the day when the amended judiciary article of 1867 took effect), he would have had a legal right to hold the same until the expiration of the term thereof (*The People v. Gardner*, 45 N. Y. 812).

But the office in question being a local and inferior one, was (by sec. 14, art. 6, of Constitution of 1846) subject to legislative control and action. The only constitutional restriction imposed upon said action was that said office, while it existed, should be elective.

The Legislature had the power to abolish the same or abridge the tenure thereof (*The People v. Morrell*, 21 Wend. 562; *Sill v. The Village of Corning*, 15 N. Y. 297; *Brandon v. Avery*, 22 Id. 469).

The amended judiciary article 6 of 1867 provides (section 18) that "all other judicial officers in cities, whose election or appointment is not otherwise provided for in this article shall be chosen by the electors of cities, or appointed by some local authorities thereof."

Under this provision the said act of May 17, 1873, was passed, abridging plaintiff's term of office and conferring the powers and duties thereof upon the officer or officers named in said act.

The act last mentioned repeals the acts of March 30, 1848, and April 28, 1869, by implication. The one is inconsistent with the others. The plaintiff is stripped of all power and authority as a magistrate, and the intention of the Legislature that his duties and functions should cease by the time specified, is clear and unequivocal (*Harrington v. Trustees of Rochester*, 10 Wend. 551; *Brown v. Osborne*, 2 Cow. 457; *People v. Deming*, 1 Hilton, 274; 1 Kent's Com. 524).

It would thus appear that the equities of the case are strongly in defendants' favor, and that they are entitled to a dissolution of the injunction.

The cases cited by plaintiff's counsel do not authorize his application (*In re Baker*, 11 How. 430; *In re Whiting*, 2

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Barb. 518; *Welch v. Cook*, 7 How. 178; *People v. Allen*, 42 Barb. 203; *Conover's case*, 5 Abb. 74). They were cases in which proceedings were taken under the statute to compel the delivery of books and papers by a *de facto* to a *de jure* officer. None of these authorities sustain the proposition so ably contended for, that injunctive process should be issued to restrain a party from taking possession of the books and papers of an office under a color of title thereto. On the contrary the opposite theory prevails, that title to an office can only be tried in a proceeding in the nature of a *quo warranto* (*People v. Stevens*, 5 Hill, 616; *People v. Mather*, 4 Wend. 229; *Hartt v. Harvey*, 32 Barb. 64; *Mott v. Connolly*, 50 Barb. 516; *People v. Cook*, 4 Seld. 70; *Mayor v. Conover*, 5 Abb. 171; *People v. Stevens*, 2 Abb. N. S. 353; *Hall v. Luther*, 13 Wend. 491; *Smith v. Mayor, &c.* 1 Daly, 219).

It is also contended that the act of May 17, 1873, is in violation of section 16, article 3, of the Constitution, and therefore void; that it is a local bill, and embraces more than one subject which is not expressed in its title.

I do not think it is open to this criticism. Each of its provisions has a natural and necessary connection with the proposed plan of administration of the courts in question, and the subjects referred to therein are german to, and fully expressed in its title (*Conner v. Mayor*, 1 Seld. 294; *In re Wakker*, 3 Barb. 162).

The injunction should be denied.

Order accordingly.

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LOUISE ROEHNER v. THE KNICKERBOCKER LIFE INS. CO.

Plaintiff's husband assigned to her, with the consent of the defendants, a policy of insurance on his life, issued by them. A clause in the policy provided that failure to pay any note given for the premium should cause the policy to be void, without notice to any parties interested therein. At the time for payment of the annual premium (after the assignment had been made), defendants took, in part payment thereof, a note made by plaintiff's husband, dated Dec. 11th, 1869, payable four months after date, without grace, and having a clause providing that the policy was to be void in case the note was not paid at maturity, according to the contract in said policy. No demand of payment of the note was made, and on April 12th, 1870, the amount of the note was tendered to the defendants, who refused to receive it.

Held, 1. That no demand of payment of the note was necessary; 2. That the note fell due on April 11th, 1870; 3. That the note not having been paid at maturity, all the rights of the plaintiff under the policy were forfeited, and the policy was void by its own conditions.

APPEAL by plaintiff from a judgment entered upon the decision of a judge at special term.

This action was brought against the defendants to recover the value of a life insurance policy for \$5,000, issued by them to the plaintiff's husband upon his life, and on August 8th, 1869, with their consent, assigned to her. The annual premium of \$212 became due on Dec. 11th, 1869, and on that day the plaintiff delivered to the defendants, in part payment thereof, a promissory note made by her husband, John Roehner, in the following form :

"\$120 84.

"NEW YORK, Dec. 11th, 1869.

"Four months after date, without grace, I promise to pay to the order of the Knickerbocker Life Insurance Company one hundred and twenty dollars and eighty-four cents, at with interest, value received in premium on policy No. 22,617, which policy is to be void in case this note is not paid at maturity, according to contract in said policy. JOHN ROEHNER."

The contract in the policy was as follows: "Failure to pay at maturity, any note (other than the annual premium note) given for premium, interest or other obligation on this policy,

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shall then and thereafter cause said policy to be void, without notice to any party or parties interested therein."

At the same time the plaintiff's husband executed and delivered to the defendants an annual premium note for \$212.

The note was not paid on April 11th, 1870, but on the 12th plaintiff tendered defendants the amount of the note.

On August 9th, 1870, the plaintiff's husband died, and on Oct. 10th, 1870, she demanded of the defendants the return of the policy which had been delivered to them at the time of the execution and delivery of the note, but the defendants refused to surrender it. In Dec., 1870, notice and due proof of the death of John Roehner was served on the defendants.

The plaintiff claimed that the policy was wrongfully detained by the defendants, and demanded judgment for its value, \$5,000, with interest from Oct. 10th, 1870.

On the trial the defendants tendered to the plaintiff the notes given by her husband, but she refused to receive them. No demand of payment of the notes had ever been made.

The court ordered judgment for the defendants, and delivered the following opinion:

DALY, CH. J.—The point involved in this case has been decided adversely to the views of the plaintiff in *Roberts v. The New England Life Insurance Co.* (1 Disney, 355; s. c. 2 Disney, 106). The decision is expressly in point; and being a case which was maturely considered, and there being no case that I am aware of to the contrary, I shall have to follow it for the purposes of this trial, leaving the plaintiff, if so disposed, to go to the general term, where she can be relieved from it if she can satisfy the court, *in banc* that that decision was erroneous.

A demand of payment of a promissory note, made payable at a particular day, is not necessary to charge the maker. Even when it is made payable on a certain day, at a *particular place*, it forms no part of the contract that payment is to be demanded on that day, at that place (*Wolcott v. Van Santvoord*, 17 Johns. 248; *Fenton v. Goundry*, 13 East, 457).

The maker, it is true, may show in an action upon the note,

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that he was ready with the money to pay it at the time and place ; but that goes only to the question of damages. It will relieve him from the payment of interest, but not from payment of the note. The making of a note, or the acceptance of a bill, as was held in the cases cited, binds the maker or acceptor generally and universally, and there is no occasion to demand it at the time or place of payment named in it to obtain a right of action upon it.

The instrument which the plaintiff's husband signed in this case was a promissory note, having all the distinguishing attributes. It was for the payment of a stated sum of money, absolutely and at all events, upon a certain day. It did not depend upon any contingency, and was not payable out of or from any particular fund. As a promissory note, therefore, it was for the plaintiff's husband to pay it on or before the day named, and not for the defendants, who were the payees, to demand it. A consequence was attached to his failure to pay it upon the day named, which was expressed both in the note and in the policy of insurance, which was, that the failure to pay the note at maturity should cause the policy to be void, without notice to any party or parties interested therein. He did not pay it upon the day it was due ; but the amount was tendered to the defendants upon the day following, when they refused to receive it, regarding the contract as at an end according to the condition.

This is not an action to relieve against a forfeiture ;—even if the condition were one against the strict enforcement of which a court of equity would relieve, which is by no means clear. It is an action to recover upon the policy upon the assumption that the condition was fulfilled by a tender of the money in time.

It is claimed that the note was not payable until the twelfth ; but this is erroneous. It was payable on the eleventh (Story on Promissory Notes, 213 ; Bayley on Bills, pp. 248, 249).

Though no demand of a promissory note is necessary to charge the maker, it may be where some penalty or forfeiture is to follow from the failure to pay it ; that being the rule in

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the case of a bond with a penalty to secure the performance of a collateral act (*Gibbs v. Southam*, 5 Barn. & Ad., 913), or where a forfeiture of the lease is to follow from the non-payment of rent at the stipulated time. But where the parties, by their agreement, expressly dispense with the formality of a demand or notice, the dispensation is operative (*Doe, &c. v. Masters*, 2 B. & C. 490); thus where the stipulation was that the lease should end without further notice or demand, it was held that no demand was necessary (*Fifty Associates v. Howland*, 5 Cush. 214). That is this case; the parties having expressly agreed that the failure to pay the note on the day it was due should make the policy void without notice, and the court cannot by construction make a different contract from what the parties themselves have made.

By the terms of their agreement the policy had become void on the twelfth, the day when the plaintiff went to the defendants and tendered the amount of the note, and I utterly fail to see upon what ground or principle I could hold that the condition was fulfilled by a tender of the amount of the note on that day.

It is claimed that the defendants, cannot treat the policy as void until they have returned the annual premium note of \$212, and the four months' note for \$120 84. The defendants were to retain the annual premium note, as well as the other note, until the day fixed for the payment of the latter; and, therefore, before they could return either, the breach of the condition occurred by which the policy became void. They are bound of course to return these notes when requested, but that is all the obligation on their part that can arise respecting these instruments, and in this case they have returned them by surrendering them up on the trial. What the effect upon their contract might have been if they had indorsed these notes over, so as to give a third person a right of action upon them, it is unnecessary to consider, as the defendants have not done so. They have brought them into court, and the plaintiff is entitled to the possession of them.

As the enforcement of this condition struck me as a harsh

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and not very creditable procedure on the part of the insurance company under the circumstances (for it was a failure to pay only by a day, and the plaintiff may have supposed that the note was payable on the twelfth instead of the eleventh), I was disposed, if possible, to regard the agreement to dispense with notice, as meaning notice of an election on the part of the defendants, that the policy should thereafter be void, and in that sense distinguishable from a demand; but, upon reflection, I do not think that I can so limit it, for were I to hold that a demand was unnecessary, it would be holding in reality that notice was required to render the policy void; for no demand of the note being necessary to charge the maker, the demand could only in legal effect operate as a notice that if the money was not paid when demanded, the policy would be void. It would, in fact, be refusing to give effect to the very agreement which the parties had made.

In *Baker v. The Union Life Ins. Co.* (43 N. Y. 283), it was held that the note and the policy are to be read together, where, as in the present case, the condition is the same in both. The words of the condition in that case were, that the policy should become immediately void, and forfeit to the company, if the notes were not paid at maturity. The court said, "the parties have agreed that upon failure to pay the notes at maturity, the policy shall become immediately void, and the insurers shall be released from all obligations under it. The contingency has happened, and the result dictated by the contract necessarily follows, and courts cannot release parties from their own contracts, fairly made, or make new contracts for them." It appeared in that case that the last of May the notes had been demanded, but it does not appear that any importance was given to that circumstance; the decision being put upon the broad ground that it was the failure to pay the note *at maturity* which was the contingency that made the policy void. In *Pitt v. The Berkshire Ins. Co.* (100 Mass. 500), there was a demand, but I find nothing in the opinion of the court which would lead me to infer that that was material to give effect to the condition, the decision being placed solely

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upon the ground relied upon in the case in the Court of Appeals, above cited.

In *Howell v. The Knickerbocker Life Ins. Co.* (3 Robt. 232), the husband of the plaintiff, whose life was insured, made preparations upon the day when the note was due to pay it, but before he was able to do so, he was struck with paralysis and died the following day. It was held that payment upon the day fixed, was, by the express agreement of the parties, a condition precedent to the continuance of the policy; that it could be excused only by the consent or act of the defendants, and that to maintain an action upon the policy, it was incumbent upon the plaintiff to prove that the condition had been performed.

Judgment, therefore, must be rendered for the defendants.

Judgment was entered for the defendants accordingly, and the plaintiff appealed to the court at general term.

Henry Wehle, for appellant.

Henry W. Johnson, for respondents.

The court* held that the judgment was correct, and approved the opinion delivered at special term.

Judgment affirmed.

* Present, LOEW, P. J., LARREMORE, and J. F. DALY, JJ.

Leetch v. The Atlantic Mutual Ins. Co.

WILLIAM LEETCH v. THE ATLANTIC MUTUAL INS. CO.

A judge of the court out of which a commission to take testimony has issued, may, after the commission has been executed and returned, indorse upon it an allowance of the interrogatories and a direction as to the return, such as a judge of the court would have done, had he been applied to before the commission was dispatched.

The writ of commission is to be regarded as process, and is amendable wherever process is amendable. An amendment will be allowed whenever it is in furtherance of justice, if the court has jurisdiction of the action in which the amendment is sought to be made.

The general subject of amending process at common law and under the statute discussed.

There being no provision in the statute as to the mode in which witnesses unacquainted with the English language shall be examined, and the commissioner having acted as interpreter, no special instructions in that particular having been given by either party,—*Held*, that it would be assumed that they meant that he should do so, there being no pretence that he was not able to translate correctly the questions into Spanish and the answers into English, or that he had been guilty of any partiality or unfairness.

It was agreed that if either commissioner were absent, the examination might be taken before the other. One of the commissioners was at the place where the commission was executed when it was received, and for some time after, but was absent in the city of Mexico when the witnesses were produced and examined before the other commissioner. *Held*, in the absence of any proof of abuse or of any unfairness or partiality by the commissioner who acted, that this was no ground for vacating the commission.

SPECIAL TERM, *November*, 1873.

MOTION to amend a commission to take testimony on the part of the defendants, and to vacate the return to a commission issued by the plaintiff.

The commission issued on the part of the defendants was directed to R. B. Foster, of Brazos, Texas, and was witnessed in the name of the Chief Justice of the court, and was signed by the clerk. An indorsement by the defendants' attorney directed its return by mail or other safe conveyance to the clerk of the court, but these instructions were not signed by a judge of this court. The interrogatories and cross-interrogatories were settled by stipulation. The commission was executed and returned to the clerk of the court, and was duly

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filed April 22d, 1871. In June, 1873, the case came on for trial, and the depositions taken under the commission were offered in evidence, when for the first time the objection was raised that the instructions for the return of the commission were not signed by a judge of the court. The objection was held to be well taken, and the depositions rejected. The defendants then moved to amend the commission, *nunc pro tunc*, but the court denied the motion, on the ground that it had not the power to do so, but without prejudice to a motion to be made at special term. The court then directed a juror to be withdrawn, and allowed the case to go off for the term. In pursuance of the permission granted at the trial, this motion to amend the commission, by having the instructions for its return signed, *nunc pro tunc*, by the judge in whose name it was witnessed, was made.

The grounds of the motion to vacate the return to the commission issued by the plaintiff, appear in the opinion.

C. A. Hand, for the motion.

Abbett & Fuller, opposed.

DALY, CH. J.—I think the commission may be amended by doing now, after its execution, what ought to and would have been done when it was issued. Whether regarded as “process,” or as a “proceeding,” it is amendable under the general power given by the Revised Statutes (2 R. S. 424, § 1), which is a power to amend any process, pleading, or proceeding, in form or *substance*, for the furtherance of justice, and such is the nature of the amendment asked for here. If any judge of the court had been applied to at the issuing of the commission, he would have ordered to have been done exactly what has been done—a return of the commission by mail addressed to the clerk of the court. The commission issued by order of and under the seal of the court. The interrogatories were settled by consent of parties, instead of being allowed by a judge, as provided by statute. Had they been settled by a judge of the court, then, under the statute, it would have been his duty to

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have indorsed his allowance of the interrogatories, and to indorse upon the commission the manner in which it should be returned. The statute declares that he may, in his discretion, direct that it be returned by mail, addressed to the clerk of the court out of which it issued, and in this court this is always the direction given by the judge, unless by consent of both parties a different direction is given. It is the judge who settles the interrogatories who is to do this, but their allowance by a judge was dispensed with, the parties having settled them by consent, annexing a written stipulation to that effect to the commission. By their own act, therefore, they dispensed not only with an allowance by a judge, but necessarily with the statutory requirement of a direction by the judge making the allowance. The statute makes no provision for a settlement of interrogatories by consent of parties, but it does provide that the parties may agree in writing on the manner in which the commission may be returned. The commission was sent without any such agreement; so that the parties not only made no agreement as to the manner in which the commission was to be returned, but by settling the interrogatories themselves, they dispensed with an allowance of them by a judge, and a direction as to the manner of the return by the judge making the allowance. The defendants, at whose instance the commission issued, might, it is true, have applied to a judge for an allowance of the interrogatories, although consented to by both parties, but this would have to have been upon notice to the other party, which it is very evident was not what was contemplated by either party, or they would not have settled them by a stipulation in writing. The question then is, whether a judge of the court can, now that the commission has been executed and returned, indorse upon it an allowance of the interrogatories and a direction as to the return, such as a judge of the court would have done had he been applied to before the commission was dispatched. I think he can. The commission was tested in my name as the Chief Justice of the court, and the application is, therefore, formally made to me to amend the commission in this respect, that it may be read upon the trial.

The commission had been returned more than two years,

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and copies of the testimony taken had been furnished to both parties, when upon the cause being brought to trial, the technical objection was taken by the plaintiff that there was no direction by a judge nor any consent in writing providing for the manner of the return, and upon the application now made to have it amended in this respect under the general power given by the Revised Statutes to any court to amend any process or proceeding in any action, it is insisted that for the want of this statutory requirement, the commission was absolutely void and cannot be amended.

The want of statutory requirements in any process or proceeding in an action may be supplied by amendment; for the provision in respect to amendments makes no distinction between statutory requirements and any other. It is a general power to be exercised in all actions, and is not to be confounded with special statutory proceedings, which are not actions, and where every statutory requirement is necessary to give jurisdiction.

The writ of commission is to be regarded as process, and is amendable wherever process is amendable. The statute has added comparatively little to the power of courts of record to allow amendments. It has, however, extended these powers to all courts in which an action is pending, so as to include courts not of record, such as courts of justices of the peace. The power of amendment in courts of record in actions, was nearly as great before the statute as after it, and it is only necessary to resort to the previous practice and authorities, to know when process was amendable and when it was not. Process was not amendable where it appeared upon the face of it that it was absolutely void. It was not adjudged to be void for the *omission* of something which was essential; but for what was *contained* in it. Thus a writ was held to be absolutely void where one or more terms intervened between the teste and return (*Bunn v. Thomas et al.* 2 Johns. R. 190; *Burk v. Barnard*, 4 Id. 309). It was void because it was shown upon the face of it that it was in violation of a rule of the common law, which required that mesne process should be returnable in the term after its teste, that the defendant might not be unnecessarily detained

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in prison without having an opportunity to make his defense, which would be the case if one or more terms were allowed to intervene between the teste and the return day of the writ (*Shirley v. Wright*, 2 Ld. Ray. 777). It was an absolute nullity from what was contained in it, and to prevent abuses by the issuing of such writs, the courts were very strict and would not allow them to be amended, although at the present day it is probable an amendment might be allowed if a strong excuse were made (*Cayward v. Doolittle*, 6 Cow. 602), especially since the Revised Statutes (*Parke v. Heath*, 15 Wend. 301). So a writ returnable upon a *dies non*, as where it was made returnable upon Sunday, was regarded as absolutely void (*Mills v. Bond*, 1 Str. 399; *Kenworthy v. Peppiat*, 4 Barn. & Ald. 288; *Chandler v. Brecknell*, 4 Cow. 49); but even this was not subsequently adhered to. In *Adams v. Luck* (6 Moore, 113; 3 Bro. & Bing. 25), mesne process returnable upon a *dies non*, was allowed to be amended, and in *Parke v. Heath* (15 Wend. 301), it was held that since the power of amendment given by the Revised Statutes, such a writ was not void, but voidable, and that the court might allow it to be amended if it were "for the furtherance of justice."

If the writ were otherwise good, but something was omitted which was essential, the court would allow it to be supplied by amendment after the execution of the writ; the whole policy of the law being in favor of allowing omissions to be supplied by amendment, in cases where it tends to promote the ends of justice, and it has been truly called the wisest and most beneficent part of our law (*Williams v. Wheeler*, 1 Barb. 51).

Thus the want of the clerk's signature to the process may be supplied by amendment (*Pepoon v. Jenkins*, 3 Johns. Cas. 420, 2d ed.); or of the seal of the court (*People v. Steuben Com. Pleas*, 5 Wend. 103; *Jackson v. Brown*, 4 Cow. 550); or the sheriff's return to a venire may be added by amendment after trial (*Id.*); or a sheriff's return to process, amended after an action is brought for a false return (*People v. Ames*, 35 N. Y. 482); or process may be amended in the name of the defendant after it is executed and he is in custody under it (1 Tidd's Pr. 161, 9th Lond. ed.); or a writ of replevin in the

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cepit may, after it is executed, be amended so as to run in the *detinet* (*Anon.* 4 Hill, 603); or a writ may be amended which has no place of return, or where there is a mistake in the place (*Cutler v. Rathbone*, 1 Hill, 204; *Raymond v. Hinman*, 4 Cow. 41); or which is returnable on Sunday (*Anstice v. White*, 1 Am. Law Rep. 152; *Boyd v. Vanderkemp*, 1 Barb. Ch. R. 273; *Stone v. Martin*, 2 Denio, 185); or tested on Sunday (*Williams v. Hogeboom*, 22 Wend. 648); or in the name of one not the justice (*Brown v. Alpin*, 1 Cow. 203); or where it is directed to the coroner instead of the sheriff (*Bronson v. Earl*, 17 Johns. R. 63). But it is not necessary to pursue the illustration by a further reference to adjudged cases. The old rule was that an amendment would be allowed where there was anything to amend by (1 Arch. Practice, 67); but even this was not adhered to, and amendments have been allowed where there was nothing to amend by (*Rutherford v. Mein et al.* 2 Smith (Eng.), 392; *Carr v. Shaw*, 7 Term R. 299; 1 Tidd Pr. 130, 9th Lond. ed.). In the first of these cases it was urged that the writ being radically defective, the application was not to *amend*, but to *supply*; but the court allowed it upon the authority of the case above referred to from the 7th Term Reports, where they said "the amendment was allowed without anything *dehors* to amend by," and under the provision in our Revised Statutes, authorizing amendments, it may be said, from the interpretation put upon it in the cases I have cited, that an amendment will be allowed whenever it is in furtherance of justice, if the court has jurisdiction of the action in which the "process, pleading or proceeding" is sought to be amended. To illustrate the distinction: where a suit was intended to be commenced by declaration in the Superior Court of this city, and the declaration by which it was intended to be commenced was by mistake filed in the office of the clerk of the Supreme Court, it was held that the Superior Court could not *by amendment*, remedy the mistake, there being no action there; "the very first step in the process—the foundation of the proceeding" being wanting, as no declaration had been filed in that court (*People v. The Superior Court*, 18 Wend. 677). And an execution issued in the Supreme Court upon a

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judgment in the Common Pleas, was held to be absolutely void, and not amendable in the Common Pleas, for the reason that the Common Pleas could not amend anything that had been done in that court towards enforcing the execution of the judgment, and they could not amend an execution which was issued in the Supreme Court (*Clarke v. Miller*, 18 Barb. 271). But in the present case, the suit in which the commission issued was pending in, and the order for the commission was made in this court so that there is something here to amend by.

The plaintiff, in opposing the application, relies upon the cases of *Jackson v. Hobby* (20 Johns. 357); *Richardson v. Gere* (21 Wend. 156); *Smith v. Randall* (3 Hill, 497); and *Fleming v. Hollenback* (7 Barb. 271), adjudging that the statute authorizing the taking of testimony of witnesses out of the State by commission is an innovation upon the common-law rules of evidence, and that therefore its positive requirements must be strictly complied with. But these were not cases where any application was made to amend, but where the commission was held to be defective for want of some one of the requirements of the statute, and they in no way affect the question of the power of the court to remedy a defect of this kind by amendment. In *Ford v. Williams* (24 N. Y. 366), where a commission was rejected for want of one of these requirements—a seal—Judge Denio recognized that process without a seal might be amended, but said that that practice did not touch the case, as there had been no application to the court, and no order in the matter. He did not, in so many words, say that the defect might have been remedied by an amendment, if it had been applied for; but I think, from his language, that it is very evident that he so understood the law.

As I have said before, what would have been directed by a judge to have been done, has been done, in respect to the return of the commission. There is no pretence of any abuse. The commissioner, upon the execution of the commission, sent it by mail addressed to the clerk of the court, by whom it was duly received, and placed on file. It was for the examination of witnesses in Texas, and two years have elapsed since its execution and return. The witnesses may now be scattered or

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dead, and it would be a great hardship to delay the trial until another commission could be sent to Texas, executed, and returned to the city, to say nothing of the expense that would be imposed. I entertain no doubt of the power; and as, in my opinion, it would be for the furtherance of justice, I will formally indorse, *nunc pro tunc*, an allowance of the interrogatories, together with a formal direction for the return of the commission to the clerk of the court, that it may be used upon the trial.

There is no ground for complaint against the plaintiff for raising this technical objection to the reading of the defendants' commission, as the defendants first interposed technical objections to the reading of commissions issued by the plaintiff, upon the ground that it did not appear, the witnesses being Mexicans, that the commissioner had sworn an interpreter to translate the questions into the Spanish language to the witnesses, and to translate the answers of the witnesses into the English language, before they were written down and certified by the commissioner. The commissioner, who was in the consular service of the United States, was acquainted with the Spanish language, and having received no special instruction in the commission to the contrary, he very naturally acted as interpreter, putting the questions sent to him to the witnesses in Spanish, and putting the answers returned by them into English. There is no pretence that he was guilty of any partiality or unfairness; that he was not able to translate correctly the questions into Spanish, and the replies into English, or that he did not in every instance do so. In the absence of anything to the contrary, it will be presumed that the commissioner did his duty fairly and honestly (*Sheldon v. Wood*, 2 Bosw. 280). There is no provision in the statute as to the mode in which witnesses unacquainted with the English language shall be examined. They must necessarily be examined through an interpreter, and where the commissioner to whom the commission was sent acted as interpreter, and no special instructions in that particular were given him by either party, it will be presumed that both parties meant that he should do so. The commission was executed at Frontinara, in

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Mexico, the commissioners being the United States consul and vice-consul at Tabasco, in Mexico, where the prevailing or common language of the people is the Spanish. The witnesses named in the commission bear Spanish names. It is very evident, from these circumstances, that the parties intended that the commissioners should interpret from the English to the Spanish and from the Spanish to the English, if it should be necessary, and in the absence of anything to the contrary, such will be the presumption.

The examination was taken before the vice-consul, provision having been made in the commission that if either were absent, it might be taken before the other. The commission is sought to be set aside because the consul was in Tabasco for some time after the commission arrived there, and that it might have been executed before him, although he was absent in the city of Mexico when the witnesses were brought before the vice-consul for examination. It is stated upon *information* and belief, that the evidence taken before the vice-consul "*is inconsistent with proven facts,*" and the defendants therefore move that the commission be vacated. I am at a loss to perceive what ground this affords for vacating the commission. Not a single fact but this is stated; nothing to show any abuse on the part of the vice-consul who acted; any unfairness, partiality, or misconduct on his part, or on the part of any one else. The application to vacate the plaintiff's commission, either for the want of a sworn interpreter, or because the vice-consul alone acted, will be denied; and that there may be no further delay, the defendants' application for the amendment of his commission will be granted upon his stipulating in writing that the plaintiff's commission may be read on the trial without any objection to the mode of executing it.

Order accordingly.

The Atlantic and Pacific Telegraph Co. v. The Western Union Telegraph Co.

THE ATLANTIC AND PACIFIC TELEGRAPH CO. v. THE WESTERN
UNION TELEGRAPH CO. *et al.*

Plaintiffs and defendants were the owners of parallel and competing telegraph lines between Cleveland, Ohio, and New York, and the defendants also controlled and managed, partly as owners and partly as lessees, a line from New York to Plaister Cove, in Nova Scotia, at which place their lines connected with certain foreign ones, making a chain of telegraphic connection between this country and Europe; *Held*, that the plaintiffs were not, within the meaning of the statutory provision, to be regarded as owners of parallel and competing lines between New York and Plaister Cove in Nova Scotia, so as to authorize defendants to refuse to receive from them, at New York, messages to be transmitted along that line, directed to Europe.

Where defendants were engaged in the business of transmitting telegraph messages from New York to Europe; *Held*, that it was not unreasonable for them to require, where they receive dispatches in New York from other companies for transmission to Europe, that there should be attached to the telegram the date at which it was received by them in New York, and the name of the company from whom it came, so that the date at New York and the name of the company might be attached to and form a part of the dispatch in its transmission to Europe, nor that they should make an extra charge for this addition to the dispatch.

A regulation of the defendants required when such messages were received from other companies at New York for transmission along the defendants' line to Nova Scotia for Europe, that a power of attorney from the sender of the message should in each case be produced to the defendants, authorizing them to send the message, or it would be refused. *Held*, that the regulation was unreasonable, as it was imposing upon other companies what was practically impossible in the due and speedy transmission of messages along their lines for Europe; was manifestly enacted to give the defendants along their parallel lines the monopoly of all such messages, and if permitted, would defeat the provision of the statute, which enacts that every company in this State must receive and transmit a dispatch from another company, which is from or to an individual, unless in the case specially excepted.

SPECIAL TERM, *November*, 1873.

MOTION to vacate an injunction.

This action was brought against the Western Union Telegraph Company, the Anglo-American Telegraph Company Limited, and Le Société du Cable Transatlantique Français Limité, to compel them to receive and transmit messages tendered to them by the plaintiffs. The statutory provision upon which the plaintiffs based their action is as follows: "It shall

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be the duty of the owner or the association owning any telegraph line doing business within this State, to receive dispatches from and for other telegraph lines and associations, and from and for any individual, and on payment of their usual charges for individuals for transmitting dispatches as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith, under the penalty of one hundred dollars for every neglect or refusal so to do, to be recovered, with costs of suit, in the name and for the benefit of the person or persons sending or desiring to send such dispatch; provided that nothing contained in this section shall be construed to require any telegraph company or association to receive and transmit dispatches from or for any other company or association owning a line of telegraph parallel with or doing business in competition with the line over which the dispatch is required to be sent" (Laws of 1848, ch. 265, amended by Laws of 1855, ch. 559, 3 Edmonds' Statutes at Large, 722, § 11).

An injunction order restraining them from refusing to receive and transmit the messages tendered to them by the plaintiffs was obtained upon affidavits and the verified complaint, which set forth that the plaintiffs owned and operated a telegraph line extending from New York city, through Cleveland, to Chicago, and by means of contracts made with divers parties managed and operated other lines, extending from Chicago, through Virginia City in Nevada, to San Francisco. That the Western Union Telegraph Company were doing business in New York city, and were engaged in the management and operation of telegraph lines extending from New York to Brest, in France, and Valentia Bay, in Great Britain; and owned that part of said lines extending from New York to Duxbury, in Massachusetts, and Plaister Cove, in Canada. That these telegraph lines connected at their termini in Europe with other lines extending to Munich, in Bavaria, and to the city of Cintonje, in Montenegro. That on August 9th, 1871, the plaintiffs tendered to the Western Union Telegraph Company, for transmission, two messages, one addressed to Prince Nicholas Petrovitch, Cintonje, Montenegro, and the other to A. Bichlmaier, Munich, Bavaria. These messages were written

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on the printed forms furnished by the defendants. The first of these messages was received by the plaintiffs, at their office in Cleveland, Ohio; and the second, at their office at Virginia City, Nevada; and the senders of each requested and authorized the plaintiffs to transmit the same by their line to New York, and there to deliver the same to the Western Union Telegraph Company, for transmission to the terminus of the Atlantic Cable, in Europe, from whence it might be forwarded to its destination.

Under each of the messages was written: "To Cable Company, New York. This is handed to you by me for the A. & P. Telg. Co., 11 Broad St., New York, as agent for the sender. A. W. SMITH, Mangr., Delivery Dept., 11 Broad St., New York."

That with the messages were tendered the usual rates for their transmission, but the Western Union Co. refused to receive or transmit them, and notified the plaintiffs that they would not receive for transmission or transmit any messages from the plaintiffs, unless the plaintiffs would produce in each case a power of attorney from the sender of each message authorizing the defendants to receive and transmit the same. That it was practically impossible for the plaintiffs to transmit any messages under such conditions, and that the defendants' object was to injure the business of the plaintiffs, and obtain a monopoly of business for the defendants, who had a telegraph line extending westerly from New York which competed with plaintiffs' line.

An injunction order was obtained, enjoining the defendants "from refusing to receive and transmit to their respective termini, and there to deliver to the next connecting telegraph company, any and all telegraphic messages which shall be delivered to them, or either of them, by the plaintiff or its agents, for transmission to Europe, or any city or town therein accessible by telegraphic communication, and that they transmit the same in the order in which they are received with impartiality and good faith—provided the plaintiffs shall, upon tendering such messages for transmission, pay to the person authorized to receive European or cable messages such compensation therefor as is required by the defendants, or either of them, for

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similar messages from persons other than the plaintiff, and shall tender the same within the usual hours of business."

The nature of the affidavits used on the motion to vacate the injunction order, and those used in reply, appear by the opinion.

Grosvenor P. Lowrey, for the motion.

Everett P. Wheeler, opposed.

DALY, CH. J.—The statute makes it obligatory upon any telegraph company doing business in this State to receive dispatches from other telegraph lines or associations, which are from or for any individual, upon the payment to said company of its *usual* charges, and it requires the company to transmit the dispatch with impartiality and good faith, exempting it, however, from any obligation to receive or transmit dispatches from or for any company owning a line of telegraph parallel with, or doing business in competition with, the line over which the dispatch is required to be sent (3 Edmund's N. Y. Statutes at Large, p. 722, § 11).

The defendants insist that they were under no obligation to receive and transmit the dispatches sent to them by the plaintiffs, upon the ground that the plaintiffs are the owners of a line coming within the meaning of this last provision of the statute. The plaintiffs are owners of parallel and competing lines with the telegraph line of the defendants between Virginia city, Nevada, and the city of New York, and Cleveland, Ohio, and the city of New York—these two western cities being the points from which the plaintiffs transmitted the messages which the defendants refused to receive from them at New York for transmission to Europe. The defendants claim, also, that the plaintiffs are the owners of a competing line from New York to Boston; but this the plaintiffs deny, and I shall, therefore, treat this as disproved.

The defendants are the owners of a line from the city of New York to Duxbury, in Massachusetts, and the owners in part and lessees in part of lines from the said city to Plaister Cove, in Nova Scotia, from which places said lines connect

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with certain foreign companies, making a chain of telegraphic connection between this country and Europe. They admit that over these lines they receive dispatches for Europe, which they deliver, at their termini, to the connecting European lines. With the lines which the defendants operate between the city of New York and their termini in Massachusetts, and at Plaister Cove, Nova Scotia, the plaintiffs have no parallel or competing lines, and it is over these lines that the plaintiffs required the dispatches to be sent, which the defendants refused to receive.

The defendants insist that, because the plaintiffs are owners of lines parallel to and competing with their lines, as far as the city of New York, that they, the defendants, are not obliged to take the messages which the plaintiffs send to them in New York, and transmit them over the lines which the defendants operate from New York to Plaister Cove, in Nova Scotia, or to Duxbury. They claim that they are excused from so doing by the statute, which, they insist, means a line competing with them on any part of the route over which a message is sent. One of the messages sent by the plaintiffs was transmitted by the plaintiffs from Nevada to New York, its ultimate destination being Montenegro, in Europe, and the ground taken by the defendants is, that as the plaintiffs were a competing line in the transmission of this message from Nevada to New York, the defendants were, by the statute, excused from taking it at New York, and sending it over their line on the way to its destination. No such construction as this is warranted by the statute. There is no difficulty in the interpretation of its meaning. It says, "the line over which the dispatch *is required to be sent*," and in this case that line was either the one extending from New York to Duxbury, or the one from New York to Plaister Cove—routes operated exclusively by the defendants. So far as respects the defendants, it was not the sender of the dispatch, but the plaintiffs, by whom it had been transmitted to New York, that required the defendants to transmit it further, and the route over which the plaintiffs required it to be sent was one where they had no parallel or competing lines. As a telegraph company, they had the right, by statute, to require the defendants to receive and transmit a dispatch, unless they were themselves the owners of parallel or compet-

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ing lines on the route over which they required it to be sent, and this was not the case.

The ground thus disposed of, at least so far as this motion is concerned, was taken upon the argument; but it was not the ground upon which the defendants refused to receive the dispatches when presented to them. They refused to receive any messages from the plaintiffs for transmission along their line, unless the plaintiffs would produce in each case a power of attorney from the sender of each message, authorizing the defendants to receive and transmit it. This was imposing what was practically impossible in the due and speedy transmission by the plaintiffs of a telegraphic dispatch which was to go to Europe; for to carry out such a regulation as this, the dispatch, when received at New York, would have to be kept there until the plaintiffs could in each case receive the power of attorney by mail. If the defendants could do this, they could wholly defeat the statute, which has declared that they must receive and transmit a dispatch from another telegraph company, which is from or to an individual, unless in the case specially excepted; for the defendants being the owners of competing lines over a large breadth of this continent, no other company could transmit a message from New York for Europe, by routes also used by the defendants, without a delay in each case at New York, which would compel the company to abandon the business, and leave the whole of it to the defendants. It is not necessary to consider how the public might be affected by thus cutting off all competition in the transmission of European messages, so far as their transit in the United States is involved. It is sufficient that a statute of this State has made it obligatory upon any company doing business here, to receive and transmit dispatches from and of other companies, and that the condition which the defendants wish to add to this statutory regulation would render it wholly nugatory.

The defendants state in their affidavit that before the 9th of August, 1871, the day when they refused to receive the messages, they had adopted a regulation which was then in force. It is in these words: "Whenever messages which have come over the line of any other telegraph company are offered by such company for transmission, the person presenting the

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message must be required to paste it or write it on one of the No. 2 blanks of this company, under the printed conditions, and sign his name for the company he represents under the line, 'Send the following message subject to the above terms, which are agreed to.'” This, it would seem from the dispatches which are annexed to the complaint, the plaintiffs substantially complied with, for each dispatch is signed, in the manner provided for, by the managing agent of the plaintiffs as their representative.

The defendants aver, on information and belief, that they refused these dispatches because they had not written upon them the names of the places from which each dispatch was sent, which statement the plaintiffs, upon information and belief, deny; and as the defendants have not, after this denial, which is quite as good as the defendants' assertion, furnished any positive evidence of what occurred at the time when the two messages were presented and refused, this statement will be treated as not established.

The defendants also aver in their affidavits upon this matter, that these messages were refused for the reason that they were not authenticated as being veritable messages of the persons whose names purported to be signed by them; that it was known to and stated by the agent of the plaintiffs that the messages presented were not the original messages said to have been transmitted from distant places to the city of New York over the plaintiffs' lines, but were written off in the said city by the plaintiffs' agent. This is to be taken in connection with the plaintiffs' statement in their complaint and affidavits, that the messages were refused unless the plaintiffs produced a power of attorney in each case from the person sending the message, showing that the plaintiffs had authority to transmit it, which I have assumed to have been one of the grounds taken by the defendants when the dispatches were presented for transmission. I have already expressed my views upon the unreasonableness of such a condition, in addition to which it is averred in the plaintiffs' affidavits, and not denied by the defendants, that it has never been the custom of any telegraph company in this country to require the autograph signature of the sender to be affixed to the telegram handed to it for trans-

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mission ; that the larger number of telegrams sent are signed in the handwriting of some other person than the one whose name is subscribed, and that a still larger proportion are not delivered to telegraph companies by the person whose name is subscribed, but by some other person employed or authorized by him. The truth of this statement, I may assume from the defendants' silence, is too notorious to be questioned by them, and it shows that what is exacted of the plaintiffs is unusual, and opposed to a widespread and general custom. Whether the defendants impose such a condition upon other telegraph companies also, does not appear ; but the plaintiffs aver, and the defendants do not deny it, that the defendants do not and never have required the signatures of individuals delivering telegrams to it to be authenticated in any way, nor that the name subscribed should be the autograph signature, nor that the telegram should be delivered by the person whose name is subscribed to it. The defendants aver that it has always been their custom to require messages to have appended to them the signature of the person sending the same ; but I do not understand this as averring that they require the autograph signature or satisfactory proof, in each instance, that the telegram presented for transmission was signed by the person whose name is subscribed to it, or by some one by his authority.

The defendants aver that they are advised that they cannot with safety accept messages for transmission from any person known to them not to be the ostensible author thereof without incurring personal liability to the receiver for any fraud, misstatement, deceit, or damage arising out of the transmission of such message, and that for that reason it is necessary that every message should be signed, and the signature communicated to the receiver ; that it has always been their custom to require that the name of the place from which the message is sent should be upon the telegram, as well as the signature of the person sending it. In this connection my attention is called to the decision of the Court of Appeals in *Elwood v. The Western Union Telegraph Co.* (45 N. Y. 549), by which the defendants had to pay a very heavy amount in damages for negligently sending a message in the name of the cashier of a bank at the request of a party who was held out by the

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message as entitled to credit at the bank for a very large amount.

The decision in that case furnishes no ground for exacting from the plaintiffs in all cases proof of their authority to have the message sent which they offer to the defendants for transmission. The point decided by the Court of Appeals was this: the defendants transmitted and delivered to the plaintiff in that action at Pithole, Pa., a dispatch purporting to come from the Keystone Bank at Erie, Pa., stating that it would pay the checks of T. F. McCarthy for \$20,000. The plaintiff, after receiving the message, took it to the operator at Pithole, and told him to send to the Keystone Bank at Erie, Pa., and get the name of the president or of the cashier to the message. The operator said that it was the fault of the office at Titusville, Pa., that he would send there, and get the name of the officer of the bank. He sent to Titusville, and in the afternoon of the same day a message was received at Pithole, purporting to come from Erie, and to have been forwarded from Titusville, giving, as annexed to the message, the name of the cashier of the bank, which was delivered by the defendants to the plaintiff, who, after the receipt of it, paid McCarthy \$10,000. The whole transaction was fraudulent and a forgery. No such message was received at Titusville from the bank at Erie. Both messages were written by McCarthy at the defendant's office at Titusville. The operators there knew that they were written there by him, McCarthy being known to them by name; a most material point being that they knew that no such message as the second one had been sent from Erie for transmission to Pithole. The jury found upon the evidence that the second message, through which the money was obtained from the plaintiff, was sent, under these circumstances, by the defendants' operators at Titusville to Pithole,—that is, sent as purporting to have come from Erie, when they knew that no such message had been sent from Erie. The jury having found this to be the fact, the court decided that the act was one of gross negligence, through the instrumentality of which McCarthy was enabled to succeed in getting the money, and that the defendants therefore should be responsible for the loss of it by the plaintiff. They were held liable for the act of their agents in

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falsely forwarding so important a message as this from Titusville, as one coming from Erie, and doing it without any evidence that McCarthy, a person then in Titusville, had authority to send from there a message as coming from a bank in another place, declaring, on the part of the bank, that he had a credit at the bank to the large amount of \$20,000. It required no regulation in respect to the receipt of messages, or the genuineness of the signatures attached to them, to guard against such an act as this. If they had forwarded the message as they received it at Titusville,—that is, as one coming from Titusville, and not from Erie,—no injury would have arisen, or if it had, they would not have been answerable for it; or if they or their agent had done what the banker at Pithole required, sent the message he requested to the bank at Erie, the bank would no doubt have telegraphed in reply that they had sent no such message to their correspondent at Pithole, and that McCarthy had no authority to draw checks upon them for \$20,000. It was the defendants, or rather their agents, sending a message which they knew to be false;—sending it as a message telegraphically received that day from Erie, and forwarded by them from Titusville;—that made the defendants responsible; an act of negligence so great as almost to warrant the suspicion (in view of the importance of the message and of its object) that it could not and would not have been done unless by an agent of the defendants, who knowingly co-operated with McCarthy to effect the consummation of his fraudulent scheme.

The regulation which the defendants aver they adopted in respect to telegraphic dispatches received by them from other companies, was not incorporated in the printed blanks which contain the conditions upon which the defendants agreed to transmit messages, and the defendants aver that they never heard of such a regulation until after the granting of the injunction in this suit; that they had no notice of any rules or regulations of the defendants for the transmission of messages other than those contained upon the printed blanks furnished by the defendants for cable messages; that the defendants, after their refusal to transmit the two messages referred to, offered to transmit telegrams for Europe for the plaintiffs, if the plaintiffs

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would send them as messages sent from New York by the plaintiffs for the persons to whom they were addressed, which the plaintiffs say would subject them (by the defendants' rules) to an extra charge for transmitting the date at New York, and the plaintiffs' name, amounting to one dollar in gold, upon each message sent to England, with a proportional increase for sending one to more distant places in Europe, the practical effect of which, the plaintiffs claim, would be to cut them off, in consequence of this increased charge, from the business of transmitting European messages from any point on their line between San Francisco and New York, and give the whole of that business to the defendants, they being the owners of competing lines.

It forms no part of the office of a court of justice to fix or regulate the prices which telegraph companies or others engaged in *quasi* public employments shall charge. They have the right to fix their own rates, as well as to establish such rules and regulations in the conduct of their business as will enable them to carry it on efficiently, and to protect them from loss or damage in the prosecution of it. The public nature of their business, however, has led to the recognition by courts of justice of certain general principles to which they must conform, being demanded by a due regard to the interests of the public. Thus the rules and regulations they establish must, in themselves, be reasonable and, as far as is compatible, equal and uniform in their operation. Not that they must be uniform in all instances, for there may be peculiar reasons, in certain cases, why they should be different. But a telegraph company that is obliged, as in this State, by statute, to receive dispatches from individuals and other companies, upon the payment of its *usual* charges, cannot impose regulations or prices upon certain individuals or companies which are different and more onerous than they are in the habit of requiring from others in all respects similarly situated, unless there are reasons in the particular case which justify it which the law would consequently approve (*Vincent v. Rail Road Co.* (49 Ill. 33); *Sandford v. C. W. & E. Rwy. Co.* (24 Penn. St. 378); *Baxendale v. The Great Western Rwy. Co.* (5 Common Bench, N. S. 309, 336); *Garton v. Bristol, &c. Rwy. Co.* (6 Id. 639); *Marriott*

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v. *The London, &c. Rwy. Co.* (1 Id. 499); *Pickford v. Grand Junction Rwy.* (10 Mees. & Wels. 399); *The State, &c. v. The Hartford, &c. R. R.* (29 Conn. 538); *De Rutte v. The New York, &c. Telegraph Co.* (1 Daly, 553, 558); Redfield on Carriers, §§477, 478, 483, 485, 488). I cannot hold that it is unreasonable for the defendants to require, where they receive dispatches in New York from other companies for transmission to Europe, that there should be attached to the telegram the date at which it is received by the defendants in New York, and the name of the company from whom it came, so that the date at New York and the name of the company may be attached to and form a part of the dispatch in its transmission to Europe; or unreasonable that they shall make an extra charge for this addition to the dispatch. There may be many reasons why the name of the company delivering it at New York, as a dispatch from another place, should be known to the different connecting lines through which it is to pass in the course of its transmission to its destination in Europe, and especially the company who are to deliver it to the person to whom it is addressed. Such a regulation may serve in some degree to counteract the designs of those who attempt to use the telegraph as a means of perpetrating fraud; but, whatever may be the grounds for adopting it, no court of justice would hold that such a regulation is unreasonable, if it is applied by the defendants to all telegraph companies in New York, without distinction, from whom they receive messages for transmission to Europe.

The plaintiffs say that, so far as their knowledge extends, it is the custom of all telegraph companies in the country to make no charge for the date, address, or signature of inland telegrams transmitted by them. This may be so; but it does not follow that the defendants are bound to pursue the same course in respect to telegrams received for transmission to Europe. For all I know, the custom may be otherwise in Europe, or in certain parts of it; but, whether it is so or not, is immaterial; for the law does not require one telegraph company to regulate its charges in accordance with the usage and custom of other companies, no matter how extensive or general the usage may be.

The affidavits of the plaintiffs are to the effect that this reg-

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ulation, and the extra charge connected with it, is applied by the defendants to them alone. If this were the fact, it would be difficult to resist the conviction that it was applied to the plaintiffs for the reason they suggest—to cut them off, by means of the additional charge, from the business of transmitting European messages from any point on their route. But the defendants' affidavits would indicate that the regulation in respect to the date at New York and the name was general—that is, that it was applied to all telegraph companies; but their affidavits are silent as respects the extra charge, and the regulation is not incorporated in the conditions which are printed at length on the blanks supplied by the company whereon to write messages.

All that I can say, in conclusion, is that the injunction, as framed, requires the defendants to transmit messages in the order in which they are received, and that it must, in this respect, be modified, as from the general character of the language it might be construed as prohibiting them from requiring that the message should have added to it the date of its reception in New York, and the name of the company from whom it is received. In all other respects it should be sustained.

Order accordingly.

THE SUN MUTUAL INS. CO. v. JUSTIN F. TALMADGE.

Plaintiffs, who were the owners of a quantity of coal on a boat sunk at Hell Gate, employed A., who was a wrecker, to save the coal and deliver it on shore in a safe and convenient place, for which they agreed to give him sixty-five per cent. of the value of the coal at the time and place of delivery. A. thereupon employed defendant to save the coal and sell it for the best price he could obtain, and agreed to give him sixty-five per cent. of the proceeds. The defendant, who knew nothing of the plaintiffs' contract with A., but was aware that they were the owners of the coal, saved a portion of it and, without plaintiffs' knowledge, sold it accordingly, and paid thirty-five per cent. of the proceeds of the sale to A., and retained the rest. Plaintiffs, after a demand of the coal, sued defendant for a conversion of it.

Held, that the action could be maintained, but that the defendant was entitled to have deducted from the proceeds the value of his services in rescuing the coal;

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that the value of his services would be assumed to be what the plaintiffs had agreed to pay A.—sixty-five per cent. of the value of the coal rescued, at the time and place of the delivery of it; that the amount which the defendant received for the coal sold (in the absence of any proof to the contrary) would be taken to be its value under the plaintiffs' agreement with A., and that what remained of that amount, after deducting sixty-five per cent. for the defendant's services, was the true measure of the plaintiffs' loss.*

TRIAL TERM, *November*, 1873.

ACTION tried before a judge at trial term, without a jury.

The suit was brought by the plaintiffs for the conversion by the defendant of a quantity of coal.

On the trial, the facts, as agreed upon by a stipulation between the parties, were as follows: The plaintiffs had insured a cargo of coal, amounting to 125 tons, which was being carried in a canal-boat from Port Johnson in New Jersey to Glen Cove in New York. While on its way, the boat was sunk at Hell Gate, and the coal on board was abandoned by the owners to the plaintiffs, who paid the loss, and took possession of the coal. Thereafter, and on August 12th, 1870, the plaintiffs entered into an agreement in writing with one George W. Thorn, a wrecker, by which Thorn agreed to "save the said coal and deliver it on shore in a safe and convenient place," and was to be paid therefor 65 per cent. of the value of the coal at the time and place of delivery, which sum was to be paid by the plaintiffs "at such time on due notice thereof."

Thorn commenced work under the contract, and saved a small quantity of coal, and on August 14th, 1870, without the knowledge of the plaintiffs, entered into a contract in writing with the defendant, by which the defendant agreed to take all of the coal that he could get out of the sunken boat and dispose of it at the best price he could get "for all parties concerned," the defendant to receive for his labor 65 per cent. of whatever the coal might sell for, Thorn to pay nothing of the expense incident to the labor.

The defendant, who did not know the contents of the agreement between Thorn and the plaintiffs, but who was aware that the plaintiffs were the owners of the coal, went to work, and at

* This case is reported, as the parties have acquiesced in the judgment.

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considerable labor and expense, saved 83 tons of the coal which, without the knowledge of or notice to the plaintiffs, he sold, receiving therefor \$362 50, which was the fair and reasonable value thereof, at that time. Of this amount, he paid 35 per cent. to Thorn, and retained the remainder. After the sale of the coal, the plaintiffs, without tendering him anything in payment for his labor and expenses, demanded it of the defendant, who refused to deliver it, and the plaintiffs thereupon brought this action for the conversion of the coal.

Evarts, Southmayd & Choate, for plaintiffs.

Oscar Frisbie, for defendant.

DALY, CH. J.—The sale of the coal was a conversion. Thorn had no right, under the contract, to sell it. The agreement was, that he was to save it from the wreck at his own expense, and with the utmost dispatch deliver it on shore in a safe and convenient place, for transhipment, for which service he was to receive 65 per cent. of its value at the time and place of delivery, which amount was to be paid by the plaintiffs on receiving due notice of its delivery. If Thorn had executed the contract, the utmost that he could claim would be a lien upon the coal for the stipulated compensation—that is, the right to retain it in his possession at the place of delivery until he was paid, or to foreclose the lien in the mode allowed by law. A sale of it by him would be an unauthorized and wrongful act, which would discharge the lien and make him accountable to the plaintiffs for the full value of the coal at the time of the conversion. The defendant could have no greater right than Thorn had under the contract. It is admitted that he knew nothing of the contract which the plaintiffs had made with Thorn, but he knew that the property belonged to the plaintiffs, and it behoved him to ascertain whether Thorn had any right to sell the coal, before making a contract with Thorn, by which Thorn agreed that the defendant might sell it. He acted under the contract without inquiring whether Thorn had any right to make such a contract, and that contract can afford him no protection.

He is answerable to the plaintiffs for the full market value

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of the coal at the time of the conversion; which I must take to be the amount he sold it for—\$362 50—which is all that there is before me in respect to its value. But it does not follow that he has no claim for the services rendered in rescuing the coal from the wreck. Thorn could maintain no action upon his contract with the plaintiffs to recover from them the 65 per cent., as he could not show that he had performed the contract by delivering the coal on shore in a safe and secure place for transshipment, as by that contract he stipulated to do. Performance is on his part a condition precedent to any claim for the stipulated compensation under the contract, and this he could never show, as that contract was violated by the contract he made with the defendant, and the performance of it rendered impossible, by the defendant carrying out the contract which Thorn made with him, or the contract which Thorn made with the defendant might be treated as an assignment to the defendant of whatever interest Thorn had in that contract. In the contract with the defendant, Thorn agrees that the defendant may take all the coal he can get from the wreck and sell it for the best price he can obtain "*for all parties concerned*," and that the defendant is to receive 65 per cent. of whatever the coal may sell for, Thorn to bear no part of the expense incurred in recovering it. There is no stipulation in that contract that the defendant is to pay anything specifically to Thorn out of the proceeds of the sale, the agreement being that it is to be sold for all parties concerned. The plaintiffs are the "*parties concerned*" in what remains under this agreement, after the 65 per cent. of the value of the coal is taken by the defendant; and if the defendant had paid over to the plaintiffs the amount received beyond the 65 per cent. and they had accepted it, Thorn would be precluded from all claim against the plaintiffs for the services rendered in rescuing the coal by the effect of the agreement he made respectively with the plaintiffs and the defendant. The agreements, taken together, show who were the parties concerned in the sale of the coal, after the 65 per cent. of the value was allowed; so that, in no aspect of the case, can Thorn recover anything from the plaintiffs for the services rendered.

But the defendant stands, in respect to the plaintiffs, in a

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very different position. He knew nothing of the contract between them and Thorn. He is placed in his present position in respect to them in consequence of the wrongful act of Thorn. He is called upon to make full restitution to them for disposing of their property without authority, which came into his hands from a third party, under an agreement from that party, that he might sell it for the benefit of parties concerned. They sue him for damages; and the right to damages is founded upon the principle of indemnity, where there is no ground, as there certainly is not, in this case, for exemplary damages. The coal was of little, if of any, value while it lay under water. The specific value subsequently attached to it was the result of the defendant's service in rescuing it, and the value of that service I must assume to be what the plaintiffs, by their agreement with Thorn, agreed to pay for it. In this action, the plaintiffs have no right to claim more than they have actually lost, which is the value of the coal at the time the defendant sold it, after deducting 65 per cent. of the amount it sold for, for the defendant's services in rescuing it. The plaintiffs' recovery, therefore, must be limited to \$126 87, with interest on that amount from the day of the sale.

Judgment for plaintiffs accordingly.

ROBERT M. HENING v. JAMES PUNNETT.

A purchaser at a judicial sale, under a judgment of the Supreme Court, in foreclosure, obtains a good title, even though an appeal has been taken from the judgment, and it is afterwards reversed, provided no stay of proceedings has been obtained upon the appeal.

Nor does it make any difference that the purchaser is a party to the foreclosure suit.

A judgment of a court having jurisdiction of the subject-matter and of the parties, is a complete protection to a purchaser under it, whether he be a party to the judgment or not.

Defendant having refused to complete a purchase of land, according to his contract, the plaintiff sold the land to another; *Held*, that this did not prevent him from afterwards bringing an action to recover damages for the breach of contract.

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Held, further, that in such action he could recover what he had been obliged to pay to a broker for effecting the contract of sale, but could not recover a further sum which he had been obliged to pay as costs and counsel fees in defending a suit brought by the broker for his commission, in which the broker had obtained a judgment.

Held, also, that the defendant could maintain a counter-claim for any sums that he had paid as a part of the purchase money at the time of the execution of the contract, the performance of the contract having become impossible by the subsequent sale of the land to another by the plaintiff; that the reason of the rule, that as long as the vendor is not in default, and is willing to perform, no action can be maintained against him to recover back what he has received in part payment, ceases, when, after the breach by the vendee, the vendor himself puts it out of his power to perform by a sale and conveyance of the property to another.

SPECIAL TERM, *November*, 1873.

THIS was an action to recover damages for a breach of contract to purchase real estate.

The complaint alleged that on April 4th, 1865, an agreement was made between the plaintiff and defendant, by which the defendant agreed to purchase certain real estate of which the plaintiff was the owner. That this agreement was made through one Findlay, a broker, who thereupon became entitled to receive from the plaintiff the sum of \$500 as commissions. That defendant afterwards refused to perform his contract. That Findlay sued the plaintiff for his commission, and recovered a verdict for \$500, for which, together with \$43 69 costs, judgment was entered against the plaintiff, and which he had paid. That plaintiff had suffered other damage through the failure of the defendant to perform his contract, to the amount of \$1,000.

The answer admitted the agreement, but set up the inability of the plaintiff at the time of the making of the agreement to convey a good title, inasmuch as his title was derived through a sale under a judgment of the Supreme Court, in an action to foreclose a mortgage, an appeal from which judgment was then pending and undecided in the Court of Appeals.

It also set up a counter-claim for \$100, which had been paid to the plaintiff on account of the purchase money at the time of the execution of the agreement.

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The other facts necessary to an understanding of the case appear by the opinion.

Marsh & Wallis, for plaintiff.

Man & Parsons, for defendant.

DALY, CH. J.—The plaintiff acquired and could convey a good title. He bought at a judicial sale, under a judgment of foreclosure in the Supreme Court, which judgment was subsequently affirmed by the Court of Appeals. The plaintiff, by his purchase at the judicial sale, obtained a good title, even if the judgment of foreclosure had been afterwards reversed, for the sale under the judgment was regular, no stay of proceeding having been obtained upon the appeal (*Gray v. Brignardello*, 1 Wallace, 627; *Gordon v. Canal Co.* 8 Am. Law Reg. N. S. 281; *Ho'den v. Sackett*, 12 Abb. Pr. 475; *Breese v. Bange*, 2 E. D. Smith, 474; *Wood v. Jackson*, 8 Wend. 9).

That the plaintiff was a party to the foreclosure suit, does not affect the question of title. "Parties," say the court, in *Parker's Heirs v. Anderson's Heirs* (5 B. Munroe, 445), "to a judgment or decree are, equally with all others, at liberty to bid and purchase property exposed for sale under the authority of a judgment or decree; and there is the same reason for protecting the interest acquired by a party under a purchase, as that of a stranger." But even if there were doubt upon the point, and the court would, upon the reversal of the judgment, order the property to be restored by the party to the judgment, there can be no doubt that if, in the meanwhile, it had been purchased from him in good faith by a third party for a valuable consideration, that the court would not disturb the title of the stranger; but would leave the party who obtained the reversal to such remedy as he might have against the prevailing party in the judgment, to obtain an equivalent for the property sold under the foreclosure. Thus, in the present case, if the defendant had taken a conveyance of the property from the plaintiff, and paid him the consideration provided for in the contract of sale, he would have acquired a good title. That is, if he had

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purchased in good faith, as he had contracted to do, even though, after the making of the contract, and before the acceptance of the conveyance and the payment of the price, he was informed that an appeal had been taken from the judgment to the Court of Appeals, his title, in my opinion, could not have been disturbed. It does not lie with the party who obtains a reversal of a judgment to complain, as he had it in his power to prevent a sale, by giving security and obtaining a stay of proceedings; and this being the case, a judicial sale made pursuant to a judgment of a court having jurisdiction of the subject-matter and of the parties, ought to be, and, in my opinion, is a complete protection to a purchaser under it, whether he be a party to the judgment or not.

The defendant, after the making of the contract, was apprised that the appeal to the Court of Appeals was without security, and consequently did not stay proceedings upon the judgment. His legal adviser, Mr. Man, obtained from the appellant's attorney, a copy of the appeal book, and took it to the defendant; so that it may be assumed that both he and the counsel knew that there had been no stay upon the appeal. His counsel, no doubt, advised him that it was not safe to take the property pending the appeal, as the judgment might possibly be reversed; and he, it may be supposed, refused to take it, that being the opinion of his professional advisers. That they were mistaken in the advice they gave, however, does not relieve him from the obligation of performing his contract, or from the consequences arising from his refusal to do it. It is not for him or his counsel to say whether the contract is to be performed or not. He entered into it, and it is for the court to judge whether the ground upon which he refused to complete it excused him from the performance of it (*Rigney v. Coles*, 6 Bosw. 485). I must hold that it did not; that a valid title passed to the plaintiff under the judicial sale, and that a deed from him to the defendant of the property, when the plaintiff offered and was willing to convey, would have vested in the defendant a complete and perfect title.

I shall not inquire into the effect of the alleged easement under the contract, as the existence of the easement was not

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given as the reason for not taking the property ; and, for all I know, it may have been in the plaintiff's power, if the objection had been made, to have removed it.

That the plaintiff afterwards sold the property can in no way affect his claim to recover the damage he was put to by the defendant's refusal to take it. He sold it after the defendant had repeatedly and positively refused to take it, and the plaintiff then had a right to sell it. He does not seek to charge the defendant with any loss arising from the difference between the contract price and the amount subsequently obtained for it. His action is for damages directly resulting from the defendant's failure to perform his contract, that is, the commission which the broker earned, and which, in a suit brought by the broker, it was adjudged that the plaintiff should pay, and which he did pay. This was a loss imposed upon the plaintiff in consequence of the defendant's refusing to take the property, and this amount, with interest, the plaintiff is entitled to recover. I do not think, however, that he can charge the defendant with the costs of defending the suit brought by the broker, or with the fee of \$250 paid by him to his counsel for his services in the defense. The judgment in that suit must be regarded as adjudging that he was liable to the broker ; and that being the case, he cannot charge the defendant with the costs of a defense which he did not succeed in establishing. The recovery of the judgment by the broker for the full amount claimed by him, shows that the amount should have been paid without suit.

The defendant is entitled to set off the \$100 paid by him at the time of the making of the contract. It is well established that a party who makes a contract to purchase property, and refuses, without lawful excuse, to perform it, cannot maintain an action to recover back money paid as earnest or in part performance at the time of the execution of the contract, if the other party is able and willing to perform (*Dowdle v. Camp*, 12 Johns. 451). But such is not the case here. When the plaintiff brought this action to recover the damages he had sustained in consequence of the defendant's refusal to perform, the plaintiff had sold the property. He is not now able to

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convey it to the defendant, and when the vendor has parted with the title, so that he cannot thereafter perform on his part, he has no right to retain the money received in part payment at the time of the execution of the executory contract (*Abbott v. Draper*, 4 Denio, 54). As long as the vendor is not in default, and is able and willing to perform the contract on his part, no action can be maintained against him to recover the money back; but the reason of this rule ceases when he parts with the property, and puts it out of his power to perform the contract thereafter on his part. There is no reason why he should after that retain the money received in part payment of a contract which cannot now be performed. He may bring an action for damages for the loss or injury he has sustained by reason of the other party refusing to fulfil his contract; and if his damages be greater than the amount he received in part payment, he may recover an amount sufficient to reimburse him fully for his actual loss; or if the other party bring an action to recover back what he paid the vendor, in that action may counter-claim the damages he suffered by the breach of the contract. When the vendee refuses to take the property, and pay for it, the vendor, if he thinks proper, may sell or dispose of it. If he does so, however, he cannot retain what he received in part payment, distinct and independent of his general remedy for damages, which is what the plaintiff insists upon in this action. He seeks not only to recover the \$500 paid to the broker, which is all the damage shown to have resulted from the breach of the contract, but insists upon his right to retain in addition the money received from the defendant in part payment of the contract. This he cannot do.

Judgment for plaintiff for \$400, and interest, besides costs.

MEMORANDA

OF

CASES DECIDED DURING THE PERIOD EMBRACED IN THIS
VOLUME, AND NOT REPORTED IN FULL.

WILLIAM L. WILSON *v.* STEPHEN H. MILLS *et. al.*

(Decided in May, 1871.)

A pilot may recover the penalty for refusing to accept his services provided for by the pilotage laws (1 Laws of 1857, p. 500, ch. 243, § 29), although the offer and refusal were made beyond the territorial jurisdiction of the State.

APPEAL by defendants from a judgment of a District Court.

D. & T. McMahon, for appellants.

Thomas H. Hubbard, for respondent.

Opinion of the court* by LARREMORE, J.

Judgment affirmed.

Reported in full in 10 Abb. Pr. N. S. 143.

JOHN G. HAVILAND *et al. v.* LOUISA D. WEHLE.

(Decided in January, 1872.)

In the New York Marine Court, under Laws of 1831, ch. 300, § 34, an action cannot be commenced against a resident defendant by short attachment. The attachment in such cases must be returnable in not less than six nor more than twelve days, and must (except as otherwise provided by § 36) be served in accordance with 2 R. S. pt. 3, ch. 2, tit. 4, art. 2.

APPEAL by plaintiffs from a judgment of the general term of the Marine Court, affirming an order of that court at special term, vacating an attachment.

Dubois Smith, for appellants.

Charles Wehle, for respondent.

Opinion of the court† by LOEW, J.

Judgment affirmed.

Reported in full in 43 How. Pr. 59.

* Present, DALY, Ch. J., LARREMORE, and J. F. DALY, JJ.

† Present, DALY, Ch. J., ROBINSON, and LOEW, JJ.

Wehle v. Haviland. Carpenter v. C. P. N. & E. R. R. Co.

LOUISA D. WEHLE v. JOHN G. HAVILAND *et al.*

(Decided in January, 1872.)

Where property is taken out of the possession of the trespasser after the trespass, by virtue of valid legal process against the owner, and the property is applied under such process to the use of the owner, those facts may be shown in mitigation of damages in an action for the trespass.

Such facts must, however, be specially pleaded.

The opinion of an expert is only admissible or of any weight when the facts or particulars upon which it is predicated have been so distinctly proven that any other expert who heard the facts testified to, or to whom they were communicated, would be, in a like manner, enabled to make an estimate, or give an opinion. The general statement by a witness of his opinion or conclusion, unless the facts and particulars upon which it is founded appear to be within his knowledge, and the process by which his conclusion is arrived at is shown, is improper testimony to be admitted on a trial, and amounts, at most, to mere conjecture.

There is no contribution between joint wrong-doers.

In actions *ex delicto*, it is in the discretion of the jury to allow interest or not, but the plaintiff is not entitled to it as a matter of right.

APPEAL by defendants from a judgment entered on the verdict of a jury at trial term.

C. Bainbridge Smith, for appellants.

Charles Wehle, for respondent.

Opinion of the court* by J. F. DALY and ROBINSON, J. J.
Judgment reversed.

Reported in full in 42 How. Pr. §99.

JAMES S. CARPENTER AND ANOTHER v. THE CENTRAL PARK,
NORTH AND EAST RIVER R. R. Co.

(Decided in January, 1872.)

A corporation sued in the New York Marine Court, in an action over the subject-matter of which the court has jurisdiction, waives any objection to the jurisdiction of the person by appearing and contesting on the merits.

A question as to the usual method of constructing street railroads, prefaced by an inquiry whether the witness had observed the manner of construction, is not one calling for the special knowledge or skill of an expert.

On the question whether a street rail has been properly laid, an expert may give his opinion based upon previous testimony as to the condition of the rail at a particular time.

A street railroad is responsible for an accident which could not have occurred

* Present, ROBINSON and J. F. DALY and LOWE, JJ.

Waller v. Thomas.

except for the improper laying of a rail, even though the municipal authorities were also negligent to the same extent in improperly paving the street.

It seems, that a street railroad, having power to take up and replace pavement on the line of its road, is responsible for an accident occurring through defective pavement on their track, even though the municipal authorities are bound to keep the pavement in repair.

APPEAL by defendants from a judgment of the general term of the Marine Court, affirming a judgment entered on the verdict of a jury.

Brown, Hall & Vanderpoel, for appellants.

E. Bartlett, for respondent.

Opinion of the court * by DALY, Ch. J.

Judgment affirmed.

Reported in full in 11 Abb. Pr. N. S. 416.

JOSIAH A. WALLER v. JOHN THOMAS *et al.*

(Decided in February, 1872.)

The complaint in an action for rent against the individual members of a club composed of more than seven persons, alleged that the defendants were members of and partners in said club at the time of the letting in question; that the lease was made to three of the members in pursuance of the authority and direction of said club, and for its use; that the members of said club subsequently ratified said lease, and entered into possession of and occupied said premises for a certain time, and had paid various sums on account of the rent thereof, leaving due a balance for which judgment was asked.

Held, on demurrer, 1. That the complaint contained facts sufficient to hold the defendants liable as assignees of the lease, and did not show any facts which made the club such an association as is intended by Laws of 1851, p. 838, c. 455, extending to them the provisions of Laws of 1849, p. 889, c. 258, in relation to joint stock companies, as amended by Laws of 1853, c. 153.

2. That even if the association came within the act of 1851, yet the suit might still be brought against the individual members of the club, since the act of 1853, compelling suits in the first instance to be brought against the president, &c., did not affect the act of 1851.

APPEAL by plaintiff from an order at special term sustaining a demurrer to the complaint.

John J. Macklin, for appellant.

A. J. Requier, for respondents.

Opinion of the court * by ROBINSON, J.

Order reversed.

Reported in full in 42 How. Pr. 387.

* Present, DALY, Ch. J., ROBINSON and J. F. DALY, JJ.

Powers v. Witty. Flynn v. Hatton.

JOHN POWERS v. CALVIN WITTY.

(Decided in February, 1872.)

The judgment of a justice in summary proceedings is conclusive in a subsequent proceeding on the part of the landlord, for the rent, and it makes no difference that the judgment was taken by default.

EXCEPTIONS to a judge's charge directing a verdict for the plaintiff, ordered to be heard at general term.

A. C. Anderson and *John Graham*, for plaintiff.

W. H. Duryea and *J. F. Baker*, for defendant.

Opinion of the court* by J. F. DALY, J., and DALY, Ch. J.
Judgment for plaintiff.

Reported in full in 42 How. Pr. 352.

ELIZABETH FLYNN v. MARY F. HATTON.

(Decided in July, 1872.)

A promise by a landlord to repair, made after delivery and acceptance of a lease, requires a new consideration to render it binding.

But such promise furnishes no ground for awarding additional damages, except so far as the tenant (the landlord not having actually commenced to make the repairs) is delayed and hindered in making them (primarily) at his own expense.

The mere agreement of the landlord to repair, has reference only to the condition of the building or premises demised, for the purpose of their profitable use; and the pecuniary benefit to be derived from their enjoyment; or loss from being deprived of their use in such state of repair as the agreement intended. Such an agreement in no way contemplates destruction of life, or casualties to the person or property of any one, which might accidentally result from an omission to fulfil the agreement.

Where a child three years of age was, through the inattention of its parents, injured by falling from a piazza—a part of the private premises of the family in a tenement house—known to the parents to be defective and insecure by reason of natural decay; *Held*, a case of contributory negligence on the part of the parents in charge of a child too young to exercise discretion to avoid such a danger.

The rights of recovery of a child for negligent injury to its person, are controlled by the neglect of its parents, to the same extent as if it were capable of governing its own conduct, and had been equally neglectful.

APPEAL by defendant from a judgment.

Albert Matthews, for appellant.

F. H. Bryan, for respondent.

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ.

Green v. N. Y. Central R. R. Co. Schindler v. Ewell.

Opinion of the court* by ROBINSON, J.

DALY, Ch. J., dissents.

Judgment reversed.

Reported in full in 48 How. Pr. 333.

ANDREW W. GREEN v. THE N. Y. CENTRAL R. R. Co.

(Decided in July, 1872.)

A railroad company is not liable for a passenger's baggage lost by a connecting steamboat line, even though the company has given a check for the baggage to the terminus of the steamboat line, unless the company have some interest in or control over the carriage of passengers by such boat line.

In order to sustain an action against a railroad company for the loss of plaintiff's baggage upon a steamboat forming part of a connecting line, the plaintiff must show some community of interest in, or some control over, the carriage of passengers by such boat line.

Proof that the railroad company checked the baggage to the terminus of the boat line, although there be evidence that they did so for their own convenience, without proof that the passenger paid them for his passage by the boat, is not sufficient.

The statute (Laws of 1847, ch. 270, § 9) regulating the liability of a railroad company receiving freight to be transported by it to a point on a connecting road, cannot be extended so as to cover the case where the connecting route is a steamboat line.

It seems, that a railroad company has not implied power to bind itself by a contract for the delivery of passengers or baggage at a point beyond its route, by means of a connecting line of steamboats.

An admission by the superintendant of a railroad company, on the presentation of a claim for lost baggage, that the claim is a good one, is not competent evidence against the company in an action to recover for the loss.

APPEAL by defendants from a judgment entered on the verdict of a jury.

Theron R. Strong, for appellants.

Charles M. Da Costa, for respondent.

Opinion of the court* by ROBINSON, J.

Judgment reversed.

Reported in full in 12 Abb. Pr. N. S. 473.

ALBERT SCHINDLER *et al.* v. GEORGE EWELL *et al.*

(Decided in December, 1872.)

Defendants upon succeeding to the business of an old firm, in consideration of receiving all the assets of the old firm, agreed to assume all their debts; *Held*, that this was an original promise not within the statute of frauds, founded upon

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

Van Lien v. The Scoville Manufacturing Co. Weinberger v. Fauerbach.

a sufficient consideration, made for the benefit of the creditors of the old firm, and on which they could sue.

APPEAL by the defendants from a judgment of the general term of the Marine Court, affirming a judgment of that court entered on the report of a referee.

Merchant & Elliott, for appellants.

David McAdam, for respondents.

Opinion of the court* by DALY, Ch. J., and LARREMORE, J.
J. F. DALY, J., dissenting.

Judgment affirmed.

Reported in full in 45 How. Pr. 83.

A. N. VAN LIEN v. THE SCOVILLE MANUFACTURING COMPANY.

(Decided in January, 1873.)

Plaintiff, who was a manufacturer of photographic views, purchased of defendants "hyposulphate of soda," and they by mistake delivered to him "sulphate of iron," which, being used by his servant in the preparation of photographic views, caused damage. In a suit by him to recover for the loss thereby occasioned, it appeared by evidence given in his own behalf, that hyposulphate of soda is white or gray, while sulphate of iron is green, and the two could be readily distinguished, and that the plaintiff's servant who used the sulphate of iron whereby the loss occurred, could by mere inspection have detected the mistake, and thereby prevented the accident; *Held*, that the failure to make such inspection was contributory negligence on the part of the plaintiff, which barred his recovery, and he should have been nonsuited.

APPEAL by defendants from a judgment of the First District Court.

E. T. & G. Bell, for appellants.

Henry Allen, for respondent.

Opinion of the court† by LOEW, J.

Judgment reversed.

Reported in full in 14 Abb. Pr. N. S. 74.

JOHN WEINBERGER v. JACOB FAUERBACH.

(Decided in January, 1873.)

In a suit brought (under 2 R. S. of 1813, ch. 86, § 175, p. 408) to recover money paid for an assessment, which ought to have been paid by another person, as so much money paid for the use of the person who ought to have paid the same, the facts showing the legality of the assessment must be proved, although it is

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ.

† Present, DALY, Ch. J., ROBINSON, and LOEW, JJ.

O'Donnell v. Rosenberg.

provided by that act, that, in such a suit, the assessment, with proof of payment, shall be conclusive evidence.

APPEAL by defendant from a judgment of the Fourth District Court.

T. F. Neville, for appellant.

S. D. Sowards, for respondent.

Opinion of the court * by LOEW, J.

Judgment reversed.

Reported in full in 14 Abb. Pr. N. S. 91.

JOHN O'DONNELL v. JOSEPH H. ROSENBERG.

(Decided in January, 1873.)

Under the mechanics' lien law for the city of New York (Laws of 1863, ch. 500, § 11), by which the lien ceases after the expiration of one year, unless renewed; *Held*, that a judgment in an action to foreclose the lien, ordering the property to be sold, was invalid if rendered more than a year after the filing of the lien, and without a renewal of it, and would be reversed on appeal, although the objection was not raised on the trial, and no motion had been made to vacate the judgment.

It seems that, as in the case of liens by judgment, the actual sale must occur, and the acquisition of a title by a purchaser be effected before the expiration of the lien.

The cessation or expiration of the lien is not a subject of defense to be set up and proved by the owner, but its continuance is the only basis of any judgment *in rem* of foreclosure and sale.

A clause in a building contract provided that any neglect to comply with the conditions of the contract, &c., should be sufficient cause for the employer to claim damages at the rate of ten dollars for each day's detention so caused; *Held*, that this was a covenant for stipulated damages, and the employer was entitled to recover at that rate for delay occurring without his contributory negligence or consent.

APPEAL by defendant from a judgment in an action to foreclose a mechanics' lien.

Stephen H. Olin, for appellant.

Dennis McMahon, for respondents.

Opinion of the court † by ROBINSON, J.

Judgment reversed.

Reported in full in 14 Abb. Pr. 59.

* Present, DALY, Ch. J., ROBINSON, and LOEW, JJ.

† Present, DALY, Ch. J., ROBINSON, and LARREMORE, JJ.

Billings v. O'Brien. Townsend v. Peyser.

ANDREW W. BILLINGS v. SMITH O'BRIEN.

(Decided in May, 1873.)

Defendant, a public officer, verbally assigned a share of his pay to accrue for a certain month (more than fifty dollars) to plaintiff, but subsequently collected the whole, and only paid over to plaintiff a part of the share he had assigned.

In an action by plaintiff against defendant for the conversion of money received in a fiduciary capacity, *Held*,

1. That the sale was void under the statute of frauds.
2. That were it otherwise, as the assignment was only of a share, it would convey to plaintiff only a joint interest, which would give him a right to share *pro rata* in the moneys received by defendant, but would not entitle him to maintain an action for conversion.

The sale by a public officer of his salary, as such, before it is earned, is void as against public policy.

APPEAL by defendant from a judgment of the Third District Court.

George F. and J. C. Julius Langbein, for appellant.

Samuel Jones and Howard Ellis, for respondent.

Opinion of the court * by ROBINSON, J.

Judgment reversed.

Reported in full in 14 Abb. Pr. N. S. 238; s. c. 45 How. Pr. 392.

RANDOLPH W. TOWNSEND *et al.* v. SIEGMUND M. PEYSER *et al.*

(Decided in June, 1873.)

A referee cannot claim more than three dollars a day for his services, unless there is a different agreement in writing.

It seems, however, that if there is a parol agreement for a higher rate of compensation, and the referee makes a memorandum thereof on his minutes, this will be a sufficient agreement in writing. *Per Loew, J.*

APPEAL by plaintiffs from an order fixing the referee's fees.

A. R. Dyett, for appellants.

Charles Price, for respondents.

Opinion of the court † by LOEW, J.

Order reversed.

Reported in full in 14 Abb. Pr. 324; s. c. 45 How. Pr. 211.

* Present DALY, Ch. J., ROBINSON and LARREMORE, JJ.

† Present, DALY, Ch. J., LOEW and J. F. DALY, JJ.

INDEX.

A.

ACCOUNT STATED.

To constitute an account stated, it is not necessary that there should be mutual or cross demands. They may be all on one side, or consist of charges and the acknowledgment of payment. The simple rendering of the items of an account between the parties, and the striking of a balance, or agreeing upon the amount due, is sufficient; and upon such a state of facts an action on an account stated may be maintained. *Kock v. Bonitz*,

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2. Where the plaintiff went over the account in the defendant's presence, and found a certain sum due to the plaintiff, and the result was not objected to by the defendant; *Held*, that this was an account stated. *ib.*

3. Where an account is thus stated, it is usually conclusive upon both parties; but not absolutely so, unless there have been mutual compromises which operate as an estoppel *in pais*, but otherwise it is open to impeachment for fraud or mistake; but the burden of showing fraud or mistake is upon the party impeaching it. *ib.*

Where parties have adjusted an account, have struck a balance and agreed upon the amount due, courts are exceedingly unwilling to open it again, unless there has been fraud, or it is very clear that there has been a mistake. *ib.*

5. In an action on an account stated, which had been signed by defendant, and acknowledged to be correct, the answer set up that the defendant had been induced to sign the account by the misrepresentations of the plaintiffs, and that the account was not correct. On the trial, one of the plaintiffs was subpoenaed to produce the firm books containing the account, but failed to do so, and stated that they were lost. Defendant's counsel then swore that on an examination before trial, when the books were produced, one of the plaintiffs had given evidence which contradicted the account sued upon. *Held*, that this was sufficient evidence on the subject of misrepresentation in obtaining defendant's acknowledgment of the account to entitle him to have it submitted to the jury. *Upton v. Bedlow*, 216

ACTION.

1. The provisions of 3 Rev. Stat. 270, § 72 (5th ed.), which provide that no injunction shall issue to stay proceedings at law in a personal action after judgment, unless a sum of money shall be deposited, and a bond given as therein directed, apply to a suit brought in this court to restrain the collection of a personal judgment rendered in one of the District Courts; and a compliance with the statute is necessary to give the court jurisdiction to grant a preliminary injunction. *Gray v. Redfield*, 95
2. Where a person has been induced

to enter into a contract by fraud, he may, upon discovering the fraud, elect, either to rescind the contract, and sue in tort, or to waive the tort and affirm the contract, but having once made his election, he is bound by it, especially where the rights of third parties have intervened. *Benedict v. National Bank of the Commonwealth*, 171

3. The fact that the fraud used to induce a party to make a contract constitutes a felony, does not prevent the party deceived from affirming the contract; as a waiver of a tort in a civil action would not prejudice a criminal action for the felony. *ib.*
4. The plaintiff having been induced to make a loan on call on the security of forged bonds, after discovering the fraud, sued on the contract, and attached the money standing to the credit of the borrowers in the bank in which they had deposited the proceeds of the fraudulent loan, but proceedings in bankruptcy having been taken against the defendants in that suit, he discontinued and brought an action in tort against the bankrupt and his assignee in bankruptcy, claiming that the money in the hands of the bank was the identical money obtained from him by fraud, and that he was entitled to it as owner. *Held*, that by the proceedings in the first suit he had elected to affirm the contract and was barred from bringing a second suit founded in tort. *ib.*

See DAMAGES, 5.

MARINE AND DISTRICT
COURTS, 8, 9.

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1, 2.

PARTIES, 1.

AMENDMENT.

1. The court may, under the Code, at any time before trial, allow a defendant to amend his answer by set-

ting up a new defense. *Diamond v. Williamsburgh Ins. Co.*, 494

2. The case of *Woodruff v. Dickie* (5 Robt. 619; 31 How. Pr. 164), holding the contrary, *Held* to have been erroneously decided. *ib.*
3. The nature of the power which the court had at common law, to allow amendments investigated, the enlargement of it by statutes and judicial decisions, examined, and the cases reviewed. *ib.*
4. It is not indispensable that there should be something to amend by, for an amendment is not solely the correction of an error in a pleading already before the court, but may consist in the withdrawal of it, and the substitution of a new and different defense. *ib.*
5. A judge of the court out of which a commission to take testimony has issued, may after the commission has been executed and returned, indorse upon it an allowance of the interrogatories and a direction as to the return, such as a judge of the court would have done, had he been applied to before the commission was dispatched. *Leetch v. Atlantic Mut. Ins. Co.*, 518
6. The writ of commission is to be regarded as process, and is amendable wherever process is amendable. An amendment will be allowed whenever it is in furtherance of justice, if the court has jurisdiction of the action in which the amendment is sought to be made. *ib.*
7. The general subject of amending process at common law and under the statute discussed. *ib.*

See PLEADING, 7, 10, 11.

APPEAL.

1. Where the verdict is rendered on incompetent testimony, and there

is a well founded reason to believe that justice has not been done, the judgment will be reversed, even though there was no exception taken on the trial which would on appeal present the question of the incompetency of the evidence. *Maier v. Homan*, 168

2. Where an appeal is based on the ground of an improper rejection of competent testimony, the case must show clearly that there was an exception taken to such rejection, or that the appellant was injured thereby. *Carey v. Carey*, 270

See EVIDENCE, 7, 10.
JUDICIAL SALE, 1.
MARINE AND DISTRICT
COURTS, 4, 5.
PLEADING, 7, 11.
REFERENCE, 8.

ASSESSMENT.

See MONEY PAID, 1.

ATTACHMENT.

1. Proof of an admission by a person in debt that she had disposed of her property and was going to Canada to live, *Held*, sufficient evidence of a disposal of her property with intent to defraud creditors, to warrant the issuing of attachment against her. *Van Loon v. Lyon*, 149

See MARINE AND DISTRICT
COURTS, 2, 3, 10.
SALES, 9.

B.

BAILMENTS.

1. The general rule is that the right of lien, which is in the nature of a pledge, attaches only to property which has come into the actual possession of the bailee, factor or other person who claims the benefit of it. But a merely constructive possession may, in some cases, give a lien, although the actual

possession is in another. *Heard v. Brewer*, 186

2. Thus, where the plaintiff, a commission merchant, accepted a draft drawn on him upon advices from the drawer that he would make a shipment of goods to him to cover the amount, and the drawer shipped goods, with the clear intention on his part of appropriating them to the plaintiff for his security, *Held*, that the property in the goods passed to the plaintiff upon their shipment, and from that time the plaintiff was in constructive possession, and on their arrival was entitled to the actual possession as against an attaching creditor of the shipper. *ib.*
3. In the absence of a bill of lading, the intention to vest the property in the goods in the consignee upon the shipment, so as to give him a constructive possession, subject only to the equitable right of stoppage in *transitu*, may be inferred from other documents, such as receipts or orders, or by the correspondence which has taken place between the parties. *ib.*
4. The plaintiff intrusted a picture belonging to him to A. to deliver to B. & Co., for exhibition and sale. A. took the picture to B. & Co., and obtained a receipt for it in his own name, and pledged the receipt to defendant to secure a loan of money, and the defendant, by means of the receipt, obtained the picture from B. & Co. *Held*, that A. had not been intrusted with the possession of the picture for sale within the meaning of the factors' act (L. 1830, p. 203, ch. 179, § 3), and that the defendant could not hold it as security for his advances made on the faith of the receipt. *Frankenstein v. Thomas*, 256

BILL OF LADING.

See BAILMENTS, 8.
SALES, 5, 6.

BARRATRY.

See INSURANCE, 1, 2.

BILLS, NOTES AND CHECKS.

1. A United States treasury note issued under the act of Congress of March 3d, 1865 (13 U. S. Statutes at Large, 468), in which the name of the payee had not been filled in, was indorsed on the back by the owner, a national bank, as follows: "Pay to the Secretary of the Treasury for conversion. A. B., cashier." It was given to a common carrier to be transported to the treasury. While on the way, it was stolen from the common carrier, the indorsement on the back erased by the thief, and the note sold to a purchaser in good faith and for full value. *Held*, that the purchaser obtained a good title to the note. *Dinsmore v. Duncan*, 199
2. Negotiable notes issued by the United States Government are subject to the common law rules applicable to commercial paper. Where in such a note no payee is named, it is payable to any *bona fide* holder, before maturity, who may insert his own name, or that of any other person, as payee. *ib.*
3. The indorsement of plaintiffs to certain checks payable to their order, and belonging to them, was forged, and upon such forged indorsement the checks were, in good faith, cashed by A., who, for value, indorsed them to B., who deposited them in his bank C., which collected them, and credited B. with the proceeds. *Held*, that plaintiffs might sue A., B. and C. for a joint conversion of the checks, without making a demand. *White v. Sweeny*, 223
4. A return of the paid and canceled checks to the plaintiffs, after suit brought, will not constitute a defense to the action. *ib.*
5. The plaintiffs' ownership of the checks in such an action, may be shown by the fact of the checks being made payable to their order, and by proof of the transactions in which the checks were given. *ib.*
6. The plaintiffs were the owners of certain checks in which they were named as payees. Their indorsement was forged, and the checks so indorsed were passed to A. for value, who deposited them for collection with his bank. The latter collected the checks from the drawee, and credited A. with the proceeds. *Held*, that a joint and several action was maintainable by the plaintiffs against A. and the collecting bank for the proceeds of the checks. *White v. Mechanics' National Bank*, 225
7. Although the bank may not have acted in any other capacity, or under any other claim, than as collecting agent for A., it is, nevertheless, equally liable for its acts on behalf of a principal who could confer no such authority. Both A. and the bank, having contributed to the same injury, are bound to render but a single satisfaction. *ib.*
8. Protest of a domestic note is not necessary, and where the complaint on such a note separately alleges protest and demand and refusal, an allegation in the answer, denying the protest, does not put in issue the question of demand and refusal. *Brennan v. Lowry*, 253
9. In such a case, the rule that protest includes, by implication, a demand and refusal does not apply. *ib.*
10. The promise of the indorser of a note to pay it, made after maturity, is presumptive evidence of demand and notice, and it is not necessary to prove in the first instance that the indorser knew, at the time he made the promise, that no demand of payment had been made. *ib.*

11. In such a case, if the indorser wishes to urge as a defense the failure to make demand, he must prove it, and it will then be incumbent on the holder to prove that the promise to pay was made with knowledge of such omission. *ib.*

See INSURANCE, 15.

MARRIED WOMAN, 1.

BROKERS.

1. A real estate broker, being employed to find a purchaser for a house and lot, introduced to his principal a person who verbally agreed to buy the property at a certain price, at the same time paying ten dollars on account of the purchase money, for which the vendor gave a receipt, stating that the "sum received was part of purchase money on the sale of my house." *Held*, that the broker had performed his agreement to find a purchaser, and was entitled to his commission, although subsequently the purchaser refused to take the property. *Heinrich v. Korn*, 74
2. The broker is entitled to his commission as soon as he has found a party willing to purchase on terms which the vendor is willing to accept, and without regard to the question whether he subsequently refused to complete the bargain. *ib.*

It is not necessary to entitle the broker to compensation that the contract to purchase should be in writing. *ib.*

3. Defendants were stock brokers, carrying certain stock for plaintiff, who, on September 12th, 1867, wrote to them, directing that in case the stock should look like reaction or weaken, or have a downward look, they should sell for him 50 or 100 shares, as the case might look. On September 14th, the defendants replied that they thought the market would recover from its present depression. On

September 17th, the plaintiff ordered the defendants to purchase 100 shares, if the stock looked like rising. On the 18th, the defendants bought for the plaintiff 50 shares, and on the 20th, the market falling rapidly, they sold all the plaintiff's stock, without notice to him. *Held*, that the direction contained in the plaintiff's letter of the 12th was not revoked by what subsequently took place, and the defendants were justified in selling upon the fall in the market. *Davis v. Gwynne*, 218

4. Where a broker, under due employment by the owner, procures the sale of property, he is entitled to his commission on the sale, although the owner may close with the purchaser in ignorance of the fact that the latter has seen the broker, provided he is not misled by any act of the broker. *Hanford v. Shapter*, 243
5. Where the purchaser, after being sent to view the property by the broker, did not return to him, but, acting on subsequently acquired information, went directly to the owner and completed a contract of purchase with him, *Held*, that this did not relieve the owner from his obligation to pay the broker his commission. *ib.*
6. In an action by real estate brokers, for commissions, the plaintiffs have made out a *prima facie* case when they have proved the introduction, by them, to defendant of a person willing to purchase on the terms at which they have been authorized by defendant to sell. *Cook v. Kroemke*, 268
7. It is not necessary for them to prove, in the first instance, that the person introduced was of sufficient pecuniary ability to pay the price. On this question, the burden of proof is on the defendant to prove the contrary. *ib.*
8. Nor is the broker obliged to cause the party willing to purchase to

tender to the seller a written agreement to that effect. *ib.*

See SALES, 13, 19.
USURY, 1.

C.

CHATTEL MORTGAGE.

See SALES, 8.

COMMON CARRIER.

1. On the trial of an action against a common carrier for goods lost, the plaintiff put in evidence the carrier's receipt, which contained conditions restricting the carrier's common law liability; *Held*, that the plaintiff could not recover, except as according to the receipt, unless he showed that he had at the time of the shipment no notice of, and did not assent to, the conditions limiting the carrier's liability. *Wetzell v. Dinmore*, 198
2. Where the receipt of a common carrier contained a clause limiting his liability to \$50 for "the article" forwarded, but the receipt was for one "one package (8 cases Drugs);" *Held*, that the shipper could recover \$50 for each case lost. *ib.*
3. Plaintiffs agreed with a common carrier of freight for the transportation of certain bales of cotton at a specified rate of freight. At the time the agreement was made, no bills of lading or shippers' receipts were given by the carrier, but after the goods had been shipped, receipts were sent to the shippers containing a clause exempting the carrier from liability for loss by fire, but this clause was not brought to the notice of the shippers until after the cotton had been destroyed by fire. *Held*, that the carrier was liable for the loss. *Lamb v. Camden & Amboy R. R. Co.*, 483
4. A package of goods was received for transportation by an express company, who were to collect the price of the goods from the consignee. On the receipt given by the company for the goods was a clause relieving the company from liability from loss by fire, unless it occurred by their fraud or gross negligence, and another clause providing that in case any sum of money, besides the charge for transportation, was to be collected from the consignee, and the same was not paid within thirty days, the company might return the goods to the consignor, and that the liability of the company for the goods while in its possession for the purpose of making such collection, should be that of warehousemen only. The package was directed to A., in the care of B. When it arrived at its destination, B. refused to receive it, and the company stored it at its warehouse, where thirty-nine days after it was destroyed by fire, without any imputation of fraud or negligence on the part of the company, and before any notice had been sent to the plaintiff that B. had refused the package. *Held*, the company were not liable for the loss. *Landsberg v. Dinmore*, 490
5. A railroad company is not liable for a passenger's baggage lost by a connecting steamboat line, even though the company has given a check for the baggage to the terminus of the steamboat line, unless the company have some interest in or control over the carriage of passengers by such boat line. *Green v. N. Y. Central R. Co.*, 553
6. In order to sustain an action against a railroad company for the loss of plaintiff's baggage upon a steamboat forming part of a connecting line, the plaintiff must show some community of interest in, or some control over, the car-

riage of passengers by such boat line.

7. Proof that the railroad company checked the baggage to the terminus of the boat line, although there be evidence that they did so for their own convenience, without proof that the passenger paid them for his passage by the boat, is not sufficient. *ib.*

8. The statute (Laws of 1847, ch. 270, § 9) regulating the liability of a railroad company receiving freight to be transported by it to a point on a connecting road, cannot be extended so as to cover the case where the connecting route is a steamboat line. *ib.*

9. *It seems*, that a railroad company has not implied power to bind itself by a contract for the delivery of passengers or baggage at a point beyond its route, by means of a connecting line of steamboats. *ib.*

See RAILROADS, 5, 6.

CONSTITUTIONAL LAW.

1. A police justice of the city of New York, elected in pursuance of the act of April 28, 1869 (Laws of 1869, chap. 377), is not a constitutional officer within the meaning of the Constitution of 1846, and the Legislature had the power to abolish the office held thereunder, or abridge the tenure thereof. *Coulter v. Murray*, 506
2. The act passed May 17, 1873, entitled "An act to secure better administration in the Police Courts of the city of New York," is a sufficient authority for the dissolution of an injunction obtained to prevent the justices appointed thereunder from taking possession and exercising the functions of their office; and to this extent, said act must be held to be constitutional. *ib.*

CONTRACTS.

1. An officer of the Government is not responsible upon a contract made by him officially, in the discharge of his public duties, unless he expressly engages to be answerable, or the circumstances are such as to show that he intended to bind himself personally. *Crowell v. Crispin*, 100
2. He is not bound, even in cases where, by the terms of the contract, he would be, if the agency were one of a private nature, the reason being that it is not to be presumed that a public officer intends to bind himself personally when acting as a public functionary, or that the party dealing with him in matters relating to his public duties means to rely upon his individual responsibility. *ib.*
3. The captain of a vessel lying at New Orleans, received on board his vessel, from the Mississippi Valley Transportation Co., who had brought them from the United States arsenal at St. Louis, goods consisting of saddles, muskets, carbines, pistols, arms and accoutrements, consigned to the defendant, an officer of the ordnance corps of the United States army, at the Continental stores, Brooklyn (a storehouse for goods belonging to the United States). The goods were landed under the supervision of the superintendent of the ordnance department, were taken away in carts at the dock under the direction of the armorer, and were received by a clerk at the Continental stores. By defendant's direction, a bill for the freight was made out to the United States, and was partly paid by the ordnance department. *Held*, that the facts being sufficient to inform the plaintiff that the goods belonged to the United States, and that the defendant was merely an officer in its service, the defendant could not be made liable, personally, for a balance due for the freight. *ib.*

4. A clause in a copartnership agreement, by which the firm agreed to employ the plaintiff in a special capacity for five years, but in which the plaintiff was not named as a party, and which was not executed by him, *Held*, void as to the plaintiff, under the statute of frauds, and for want of mutuality. *Briggs v. Smith*, 110
5. An agreement not to engage in a particular business, unless it be restricted as to time and place, is void. *Maier v. Homan*, 168
6. Defendants, by the contract, being at liberty to discharge the plaintiff upon ten days' notice, *Held*, that such right was absolute, and to be exercised at discretion, and the fact that a false reason was assigned, did not prevent them from afterwards relying on their right to discharge him at discretion. *Smith v. Douglass*, 191
7. A contract for the performance of personal duties or services is unassignable, so as to vest in the assignee the right to give directions to, and have control over, the person having engaged to perform the services. *Hayes v. Willio*, 259
8. Defendant having bound himself to give theatrical performances for A. at any place A. might direct, for a time certain, and not to perform for any one else, *Held*, that A. could not assign his rights under the contract to plaintiff, so as to give him the right to prevent defendant from giving performances for other persons. *ib.*
9. The defendants agreed to employ the plaintiff in their business, and to pay him as a salary and compensation for his services, a sum which should be equal to one-half of the net profits of said business, after deducting every expense and loss connected therewith, as follows: The sum of \$3,000 yearly, and every year during the continuance of said agreement, in weekly installments, at the rate of \$3,000 per annum, and only at that rate for a shorter period than a year, and to pay any balance of said salary beyond said sum of \$3,000 per year, if realized at the end and only at the end of each year, and if not then realized, whenever thereafter the same should be realized. The business engaged in was that of "enameling and linen-finish paper collars," to which the plaintiff was to devote his exclusive time, knowledge and ability. The plaintiff worked for the defendants in pursuance of this agreement, for several months, and in a suit for the balance of the salary due, at the rate of \$3,000 per year, the defendants set up that the business had been unprofitable, and therefore there was nothing due the plaintiff: *Held*, That the fair interpretation of the agreement was, that the defendants, having confidence in the plaintiff's skill and ability to manage the business successfully, and believing that it would realize an annual net profit of at least \$6,000, employed him at a fixed compensation equal to one-half of that amount. The increase of the salary was made to depend upon the excess of profits over \$6,000, but in any event the plaintiff was to be paid at the rate of \$3,000 per year. *Coughtry v. Levine*, 335
10. A party wishing to rescind a contract on the ground of a failure to perform at the time fixed by the contract, must show either, 1. That time was originally of the essence of the contract; or, 2. That it was engrafted into it by subsequent notice; or, 3. That the delay has been so great as to constitute laches. *Myres v. De Mier*, 343
11. Under a contract to sell property which provided for a delivery of a deed at a specified time, but contained no other stipulation showing any intention to make performance on that day essential, but provided that in a certain contingency the deed might be de-

- livered after that date, *Held*, that time was not of the essence of the contract. *ib.*
12. The subsequent notice required to make time of the essence of the contract, must be express, distinct, and unequivocal. *ib.*
13. The question as to what will amount to such notice, in a particular case, considered. *ib.*
14. In view of the statute prohibiting servile labor on Sundays, a contract to pay demurrage will, in the absence of any proof to the contrary, be deemed to intend to mean demurrage for working days, and to exclude Sundays. *Rigney v. White*, 400
15. The sale of lottery tickets being illegal, a lease of premises to be used for the purposes of such sale is void, and the rent reserved thereon cannot be recovered. *Edelmuth v. McGarren*, 467
16. Defendant having refused to complete a purchase of land, according to his contract, the plaintiff sold the land to another: *Held*, that this did not prevent him from afterwards bringing an action to recover damages for the breach of contract. *Hening v. Punnett*, 548
17. *Held*, further, that in such action he could recover what he had been obliged to pay to a broker for effecting the contract of sale, but could not recover a further sum which he had been obliged to pay as costs and counsel fees in defending a suit brought by the broker for his commission, in which the broker had obtained a judgment. *ib.*
18. *Held*, also, that the defendant could maintain a counter-claim for any sums that he had paid as a part of the purchase money at the time of the execution of the contract, the performance of the contract having become impossible by the subsequent sale of the land to another by the plaintiff; that the reason of the rule, that as long as the vendor is not in default, and is willing to perform, no action can be maintained against him to recover back what he has received in part payment, ceases, when, after the breach by the vendee, the vendor himself puts it out of his power to perform by a sale and conveyance of the property to another. *ib.*
19. Defendants upon succeeding to the business of an old firm, in consideration of receiving all the assets of the old firm, agreed to assume all their debts; *Held*, that this was an original promise not within the statute of frauds, founded upon a sufficient consideration, made for the benefit of the creditors of the old firm, and on which they could sue. *Schindler v. Howell*, 558
20. Defendant, a public officer, verbally assigned a share of his pay to accrue for a certain month (more than fifty dollars) to plaintiff, but subsequently collected the whole, and only paid over to plaintiff a part of the share he had assigned. In an action by plaintiff against defendant for the conversion of money received in a fiduciary capacity, *Held*, 1. That the sale was void under the statute of frauds. *Billings v. O'Brien*, 556
21. That were it otherwise, as the assignment was only of a share, it would convey to plaintiff only a joint interest, which would give him a right to share *pro rata* in the moneys received by defendant, but would not entitle him to maintain an action for conversion. *ib.*
22. The sale by a public officer of his salary, as such, before it is earned, is void as against public policy. *ib.*
- See ACTION, 2.
BROKER, 8.
PARTIES, 1.
SPECIFIC PERFORMANCE, 10.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 14, 15, 16.

CONVERSION.

1. Plaintiffs, who were the owners of a quantity of coal on a boat sunk at Hell Gate, employed A., who was a wrecker, to save the coal and deliver it on shore in a safe and convenient place, for which they agreed to give him sixty-five per cent. of the value of the coal at the time and place of delivery. A. thereupon employed defendant to save the coal and sell it for the best price he could obtain, and agreed to give him sixty-five per cent. of the proceeds. The defendant, who knew nothing of the plaintiffs' contract with A., but was aware that they were the owners of the coal, saved a portion of it, and, without plaintiffs' knowledge, sold it accordingly, and paid thirty-five per cent. of the proceeds of the sale to A., and retained the rest. Plaintiffs, after a demand of the coal, sued defendant for a conversion of it. *Held*, that the action could be maintained, but that the defendant was entitled to have deducted from the proceeds the value of his services in rescuing the coal; that the value of his services would be assumed to be what the plaintiffs had agreed to pay A.—sixty-five per cent. of the value of the coal rescued, at the time and place of the delivery of it; that the amount which the defendant received for the coal sold (in the absence of any proof to the contrary) would be taken to be its value under the plaintiffs' agreement with A., and that what remained of that amount, after deducting sixty-five per cent. for the defendant's services, was the true measure of the plaintiffs' loss. *Sun Mut. Ins. Co. v. Talmadge*, 539

CORPORATIONS.

1. The trustees of a religious corporation can alone bind the cor-

porate body, and to execute this power, they must meet as a board, so that they may hear each other's views, deliberate and decide. The separate action of the trustees individually, without meeting and consulting together as a board, even though a majority in number should agree upon a certain act, is not binding upon the corporation, and cannot, of itself, create a corporate liability. *Constant v. The Rector, &c. of St. Albans Church*, 305

2. Plaintiff, at the request of certain of the trustees of an Episcopal church, carried on a fair for the benefit of the church, with the understanding that the expenses of the fair were to be paid for from the proceeds of the fair. Plaintiff paid the expenses of the fair, and the gross receipts were turned over to the building committee of the church, by whom they were used in the purchase of land and the erection of a church edifice. Plaintiff brought an action against the church for the money expended by her in the purchase of articles, &c. for the fair. *Held*, that the individual acts of the trustees could not bind the church, and that plaintiff could not recover. *ib.*
3. *Quære*, as to whether a religious corporation can engage in a fair for the purpose of raising money to build a church. *ib.*
4. It appeared that plaintiff had told one of the building committee, who was also one of the trustees, of her claim to be paid, from the proceeds of the fair, for the expense incurred by her, but that he had not informed the board of trustees of the claim. *Held*, that this was not notice to the trustees of her claim, and that the church took the fund relieved of any charge upon it to pay the plaintiff's claim. *ib.*

See MARINE AND DISTRICT
COURTS, 11.
RAILROADS, 8, 4.

COSTS.

See MARINE AND DISTRICT
COURTS, 7.

COVENANT.

See SPECIFIC PERFORMANCE, 9.

D.

DAMAGES.

1. In an action for a breach of contract, it is a general rule that the contract furnishes the standard of relief, but compensation will only be given for actual loss sustained. *Doughty v. O'Donnell*, 60
2. But when the party for whom the service is to be rendered wilfully delays and embarrasses the performance of the contract by the other party, who endeavors to complete it, and who is finally compelled to abandon the work, the rule that the special contract must control the rate of compensation, no longer prevails, and the party is entitled to the actual value of his services, even though it is in excess of the measure of damages fixed by the contract. *ib.*
3. Such damages may be recovered in an action on the contract, and the plaintiff in such an action, after showing that he was prevented from performing by the acts of the defendant, may show the actual value of the services rendered, and recover therefor. *ib.*
4. The defendant sold a milk route, together with the good will, &c., and agreed that he would not, for three years, sell to any of the customers on the route. *Held*, in an action for damages for a breach of the agreement, that evidence of loss of customers and diminution

of daily profits was properly admitted in evidence on the question of damages. *Tuttle v. Hannegan*, 92

5. Where defendant in such a case gave a writing in the form of a bond, but not under seal, by which he covenanted not to interfere with the milk route, *Held*, that the remedy of the plaintiff for a breach was not restricted to an action on the bond; but he might sue on the verbal agreement, and the writing was admissible in evidence at the trial. *ib.*
6. A factor having a lien upon goods for the amount of his advances, can, in an action against a creditor of his principal, who has taken the goods under attachment, recover only the value of his special property in the goods. He is not entitled to a judgment for the whole value of the goods. *Heard v. Brewer*, 186
7. Exemplary damages may be recovered for the *wilful* act of defendant in so managing his horse and carriage as to bring them into collision with, and cruelly wound and injure, the plaintiff's horse. *Lewis v. Bulkley*, 156
8. In an action for the conversion of an article, the commercial or market value of which is not clearly ascertainable, the court will not disturb a judgment for damages against the wrongdoer based upon the owner's estimate of the value of the article, the wrongdoer having had knowledge of the plaintiff's estimation of the value. *Frankenstein v. Thomas*, 256
9. Where property is taken out of the possession of the trespasser after the trespass, by virtue of valid legal process against the owner, and the property is applied under such process to the use of the owner, those facts may be shown in mitigation of damages in an action for the trespass. *Wahle v. Haviland*, 550

10. Such facts must, however, be specially pleaded. *ib.*

See CONTRACTS, 17, 18.
 CONVERSION, 1.
 EVIDENCE, 2.
 LANDLORD AND TENANT, 2,
 3, 4, 5.
 NEGLIGENCE, 4, 5, 7.
 PLEADING, 9.
 SALES, 8.

DEED.

Where a deed grants lands bounded by or running along *the side of* a public highway, it does not convey the right of the grantor in the land to the center of the street, and, when the street is closed, the fee of the land to the center of the street does not pass to the owner of the abutting land, who claims under such a deed. *Fearing v. Irwin*, 885

2. This rule applies to streets in the city of New York, closed under the act of 1867 (2 Laws of 1867, p. 1748, ch. 697), which declares (§ 8) that on any street being closed in pursuance thereof, the abutting owners shall be seized in fee simple absolute to such street. *ib.*

DEPOSITION.

1. There being no provision in the statute as to the mode in which witnesses unacquainted with the English language shall be examined, and the commissioner having acted as interpreter, no special instructions in that particular have been given by either party,—*Held*, that it would be assumed that they meant that he should do so, there being no pretence that he was not able to translate correctly the questions into Spanish and the answers into English, or that he had been guilty of any partiality or unfairness. *Leetch v. Atlantic Mut. Ins. Co.*, 518
2. It was agreed that if either com-

missioner were absent, the examination might be taken before the other. One of the commissioners was at the place where the commission was executed when it was received, and for some time after, but was absent in the city of Mexico when the witnesses were produced and examined before the other commissioner. *Held*, in the absence of any proof of abuse or of any unfairness or partiality by the commissioner who acted, that this was no ground for vacating the commission. *ib.*

See AMENDMENT, 5, 6.

E.

EASEMENT.

- A demise was of the whole of one building and the three upper floors of the adjoining building, with the privilege of using the stairway of the latter building "for the carrying in and out of ashes, coal, &c." There was free access to and from the three floors of the latter building through the first building. *Held*, that the lessee had no right to use the stairway of the latter building except for the purpose stated in the lease, and an attempt to use it for any other purpose—*e. g.*, as the principal entrance to the floors above—would be restrained by injunction. *Agate v. Lowenbein* (No. 1), 62

ESTOPPEL.

1. Estoppels are created between parties to a transaction from their failure to speak when good faith requires they should do so, or by giving misinformation as to matters which, from the nature of the transaction, tend to influence the conduct of the party with whom they are dealing. But third parties in some way connected with the subject of such dealings cannot be affected in their rights therein, unless apprised of the char-

acter of the intended action, of the materiality of the information sought, and unless they designedly give such misinformation as is acted upon to the prejudice of the inquirer. *Graham v. Fitzgerald*, 178

2. A quantity of rice, in possession of defendant, who had a lien on it for the money due him for cleaning it, was bought by plaintiffs, who informed him of their purchase, and he allowed them to take away a portion of the rice, but did not inform them of his lien. Afterwards, plaintiffs having paid in full for the rice, the seller failed, and defendant refused to deliver the balance of the rice without payment of his charge for cleaning. *Held*, that he was not estopped from enforcing his lien by his failure to give notice of it to plaintiffs, since his possession of it was constructive notice of whatever rights he had in regard to the property, and that he was under no obligation to give actual notice to the purchasers. *ib.*

EVIDENCE.

1. A witness testifying as an expert in regard to the rental of houses, swore that he had had charge of the letting of 60 or 70 houses; *Held*, error to refuse to allow him to be asked on cross-examination how many houses he had let during the time he had been in that business. *Drucker v. Simon*, 53
2. Where, on the trial of an action on a policy of fire insurance, the plaintiffs swear to their loss at a certain fixed sum, and the defendants introduce circumstantial evidence to show that it could not have been more than a certain smaller sum, *it seems* the referee or jury is not bound to accept either estimate, but may give a verdict for an intermediate sum, and *Held*, if it is an error, it is one of which the plaintiff alone can complain. *Unger v. People's Fire Ins. Co.*, 96

3. Plaintiff sued to recover for services rendered at an agreed rate of compensation. Defendant settled the suit by paying a sum not stated. In a subsequent action to recover for services alleged to have been performed, under the same contract, *Held*, that it not appearing for what sum the settlement in the former action was made, the proceedings in that action were not evidence in the second action on the question of the rate of compensation agreed on between the parties. *Briggs v. Smith*, 110

4. Upon the question as to whom the plaintiff gives credit, where one person orders him to do work for another, the circumstance as to whom the plaintiff charges the work on his books, and to whom he makes out his bill, is most material, and unexplained, is controlling. *Buck v. Amidon*, 126

5. Where, upon an uncontradicted state of facts, the point involved remains doubtful or upon undisputed facts, inferences may be drawn either way, the question is properly one for the jury, and their finding should be conclusive. But in all such cases, there must be something in the evidence on which to found the conclusion, and whether there is or not is a question of law. *ib.*

6. Possession of property constitutes notice to every one of the title of the possessor. *Graham v. Fitzgerald*, 178

7. Where work is to be done "agreeably to the plans and specifications prepared for the same by A. and B., the architects, and also according to directions and the entire satisfaction of the said architects," the approval of the work by the architects—in the absence of fraud—is decisive as between the parties. *Grube v. Schultheiss*, 207

8. Where testimony has been offered on both sides of a question, the decision of a referee, like the ver-

dict of a jury, ought to be disturbed only where some error of law has been committed on the trial, or where there is gross error in the findings of fact, showing prejudice or misconduct, or where it is against testimony intrinsically overwhelming. *ib.*

9. The rule that a person is presumed to admit a fact, stated in a conversation with him, and not denied by him, does not extend to a letter received by him, and the fact that he does not, in replying to such letter, deny an allegation made therein, cannot be used to prove an admission by him of such fact. *Waring v. United States Tel. Co.*, 233

10. Plaintiffs having a claim for damages against a telegraph company, wrote a letter to the president, stating what they claimed to be the facts in the case. The president's reply merely stated that he had submitted the letter to the counsel of the company for his opinion on it, and afterwards sent plaintiffs a written opinion of the counsel, adverse to the claim. *Held*, that the letter could not be introduced in evidence as an admission by the company of the facts alleged in it. *ib.*

11. Where improper testimony has been admitted in evidence, unless the court can say that the jury were not influenced by it, and that it could not by any possibility have affected the verdict, a new trial will be ordered. *ib.*

12. *It seems*, that since the act of 1867 (L. 1867, ch. 887), husband and wife are (in a suit for limited divorce) as competent to give evidence in their own behalf as any other witnesses. Per ROBINSON, J. *Carey v. Carey*, 270

13. In an action for injury to goods, general and gross estimates made by a witness, without examination or knowledge of their kind or quality, or of the particular ex-

tent of injury to the several articles in respect to which such estimates are made, cannot be admitted as proof of the damage sustained. *Brown v. Elliott*, 329

14. A question as to the usual method of constructing street railroads, prefaced by an inquiry whether the witness had observed the manner of construction, is not one calling for the special knowledge or skill of an expert. *Carpenter v. Central Park &c. R. R. Co.*, 550

15. On the question whether a street rail has been properly laid, an expert may give his opinion based upon previous testimony as to the condition of the rail at a particular time. *ib.*

16. The opinion of an expert is only admissible or of any weight when the facts or particulars upon which it is predicated have been so distinctly proven that any other expert who heard the facts testified to, or to whom they were communicated, would be, in a like manner, enabled to make an estimate, or give an opinion. The general statement by a witness of his opinion or conclusion, unless the facts and particulars upon which it is founded appear to be within his knowledge, and the process by which his conclusion is arrived at is shown, is improper testimony to be admitted on a trial, and amounts, at most, to mere conjecture. *Wehle v. Haviland*, 550

17. The judgment of a justice in summary proceedings is conclusive in a subsequent proceeding on the part of the landlord, for the rent, and it makes no difference that the judgment was taken by default. *Powers v. Witty*, 552

18. An admission by the superintendent of a railroad company, on the presentation of a claim for lost baggage, that the claim is a good one, is not competent evidence against the company in an action

to recover for the loss. *Green v. N. Y. Central R. R. Co.*, 553

See ACCOUNT STATED, 5.
 APPEAL, 1, 2.
 BILLS, NOTES AND CHECKS, 10, 11.
 BROKER, 6, 7.
 COMMON CARRIER, 1.
 DAMAGES, 5.
 MONEY PAID, 1.
 SALES, 4.

EXECUTORS.

1. In order to set in motion the short limitation, in favor of an executor or administrator, due notice of the rejection of the claim presented to him by the creditor must be given to the creditor himself. A notice to an attorney, who had been employed by the creditor to make out in legal shape and present the claim, is not notice to the creditor. *Van Saun v. Farley*, 165

F.

FACTORS.

See BAILMENTS.

FIXTURES.

1. In the consideration of the question, whether certain articles, which in their nature are chattels, have become part of the freehold by mere attachment and ordinary use therewith, for the general purpose to which it is adapted and employed, the intention of the owner, evidenced by according acts, is sufficient to so appropriate and convert them into fixtures annexed to the freehold, that they will pass by deed to a grantee. *Funk v. Brigaldi*, 359
2. During the negotiations for the sale of a house, plaintiff (the owner) as an inducement to defendant to purchase, told him that the house was complete and ready

for him to move into, and that all he had to do was to walk in and light the gas, as it was complete. Defendant purchased the house, and plaintiff brought an action to recover the gas fixtures, on the ground that they did not pass by a deed of the house. *Held*, that plaintiff's statement made during the negotiation for and as an inducement to the purchase, was sufficient evidence that the gas fixtures had been attached to the house to enhance the general value of the estate, and not for its temporary use, and that therefore they became attached to the freehold and passed by a deed of it. *ib.*

FORMER ADJUDICATION.

1. Defendants being indebted to plaintiff on two overdue notes, and also for a balance on a book account, gave a bond and mortgage for the amount of the whole indebtedness. Plaintiff afterwards assigned the notes, and in a suit by his assignee, of which suit plaintiff had notice, and in which he was a witness, defendants having gone to the jury on the question whether the bond and mortgage had been accepted in payment, the jury found that they had not, and defendants had judgment against them. In a subsequent suit by plaintiff on the book account, defendants set up that it had been paid by the bond and mortgage; *Held*, that on this question the judgment in the previous suit was conclusive. *Bissick v. McKensie*, 265
2. Plaintiff being liable on the notes to his assignee, as warrantor, the judgment in the former action, if it had been against his assignee, would have been conclusive on him in this action, and on the principle of mutuality of estoppels, it should be binding on the defendants also. *ib.*
3. In an action for fraudulently

entering judgment on a false affidavit of service of the summons, the plaintiff put in evidence the report of a referee appointed on a motion to vacate the judgment in the former suit, reciting that it had been referred to him to take testimony and report as to whether the summons was ever served, and that he had taken testimony, and that in his opinion it had not; also an order, made by the court on the report of the referee, vacating the judgment. *Held*, that this was not sufficient to show that the question of whether the summons had ever been served was *res adjudicata* between the parties. *Alkus v. Rodh*, 897

See EVIDENCE, 8, 17.

I.

INJUNCTIONS.

1. Where the plaintiff has an ample remedy at law for a breach of covenant, and the damages can be exactly ascertained, and no irreparable injury will be inflicted, and there is nothing which will give rise to a multiplicity of suits, the court will not interfere by injunction to compel the defendant to perform his contract specifically; but will leave the plaintiff to his remedy at law. *Agate v. Lowenstein* (No. 1), 62
2. *So held*, in a case where the tenants of a house, holding under a lease covenanting against the use of the premises "for any business that would increase the hazard or rates of insurance," were alleged to have broken the covenant; and the plaintiff, the lessor, sought to have them restrained from continuing to use the premises for the purposes forbidden by the covenant. *ib.*
3. In such a case, the increased rate of insurance would form an exact measure of damages which plaintiff could recover at law; and the in-

surance premiums being payable yearly, there could be no necessity for bringing suits for the daily breach of the covenant; so that there could not be a multiplicity of suits, and there would be no irreparable injury inflicted. *ib.*

4. *Held, also*, that the injunction should be refused, on the ground that it did not clearly appear that the purposes for which the premises were used by the defendant were a violation of the covenant, as it is only, as a general rule, where the rights of the parties are, or can be clearly ascertained, and are free from all reasonable doubt, that the court will entertain jurisdiction in the first instance to restrain an act by injunction. *ib.*

INSURANCE.

1. Barratry, as a marine term, means an intentional injury to the vessel or to the cargo; or some unlawful, fraudulent, or criminal act, whereby or in the prosecution of which, loss or injury arises to the owners of the vessel or of the cargo, or to the insurers. It does not embrace what in the law is denominated negligence. *Atkinson v. Great Western Ins. Co.*, 1
2. The defendant indorsed upon its open policy of insurance, as an additional risk to be covered by the policy, 202 bales of cotton from Augusta, Georgia, to Liverpool, England. The goods were shipped by railroad from Augusta to Charleston, thence to be shipped to Liverpool by the barque *Victoria*, the master giving a clean bill of lading for the 202 bales, freight having been engaged for the whole by that vessel. For want of room in the *Victoria*, the master sent 77 bales by another vessel, which arrived safely at Liverpool. Thirty bales of the remainder were stowed in the hold, and ninety bales were stowed on deck of the *Victoria*, without notice to the shippers, and against the remonstrance of

the agent of the owners of the vessel. During the voyage, the ninety bales on deck were thrown overboard to save the vessel. One of the perils insured against by the policy was "the barratry of the master and mariners." *Held*, in an action against the insurers to recover for the loss of the ninety bales jettisoned, that the act of the master in stowing the cotton on deck, did not amount to barratry within the legal meaning of that term. *ib.*

3. *Held further*, that the goods having been carried on deck without the knowledge or implied consent of the underwriter, they were not within the protection of the policy, and being jettisoned, there could be no claim for contribution upon a general average for their loss. *ib.*

4. The defendants' policy of insurance provided that all fraud or attempt at fraud by false swearing or otherwise, on the part of the insured, should cause a forfeiture of all claim under the policy. *Held*, in an action for a loss under the policy, that the fact that the plaintiffs in their preliminary proofs of loss and in their testimony on the trial, swore that their loss was a great deal—*e. g.*, one half—more than it was found to be by the referees to whom the issues in the action were referred, is not even presumptive evidence of false swearing or of fraud on the part of the insured, within the meaning of the policy. In such a case, the plaintiffs have the right to testify as to what they believe to be their loss, and no matter how much that may exceed their recovery in the action, fraud will not be deemed to be established, unless it appears: 1. That there were no such goods of such value destroyed, and 2. That the insured knew, or must have known, the fact when they swore to their preliminary proofs of loss. *Unger v. People's Fire Ins. Co.*, 96

5. The owner of goods insured on

board a vessel at sea, is not liable (at least, where the barratry of the master and mariners is insured against) for the act of the captain in putting to sea, from an intermediate port, in an unseaworthy condition. *Brioso v. Pacific Mutual Ins. Co.*, 246

6. By the terms of a policy of life insurance it was provided that the proposals, answers and declarations of the assured should be made a part of it "as fully as if they had been therein recited," and it was further declared in the policy that if they should be found *in any respect* false or fraudulent, that then the policy should be null and void. In the series of questions thus annexed to and forming part of the policy, was one propounding the inquiry whether the assured had ever had certain specified diseases, and if so how long, and to what extent, among which were enumerated spitting of blood and diseases of the lungs, to which the assured answered in writing, "No." At the end of the series of questions was a declaration subscribed by the assured, stating that the answers given were correct and true, and that the statements made by him should *form the basis of the contract* of insurance, and also that any untrue or fraudulent answer or any suppression of facts in regard to his health should render the policy null and void. The insurance was effected in January, 1867. It appeared that in November, 1865, he had a slight hemorrhage which lasted on and off for two days. That in March, 1866, he had another hemorrhage, which lasted nearly *ten* days, during which he raised blood twice a day—morning and evening—and was from the effects of this hemorrhage confined to his bed several weeks, and it was about a month before he was able to go out in the open air. That during the first hemorrhage he spit blood more than ten times, and that he thought the spitting of blood during both attacks came from his lungs. He

had another attack of hemorrhage in August, 1868, and in September, 1869, died of consumption; *Held*, that the answer of the assured that he had never had a disease of the lungs or spitting of blood was untrue, and avoided the policy. *Foot v. Aetna Life Ins. Co.*, 285

7. In an application previously made for an insurance upon his life to another company, the assured had made known to the agent of that company (who was the medical examiner in this application) that he had had two attacks of spitting of blood; *Held*, that this did not change the effect of the untrue answer. *ib.*
8. The answers were warranties, and any one of them being untrue, there was a breach of the warranty upon which the insurance was made, and which rendered the policy void. *ib.*
9. The judge at the trial charged that the answers were warranties to some extent, and if any answer was untrue and was *known to be untrue* at the time it was made, the warranty was broken, and the policy was vitiated; *Held*, that this was error. *ib.*
10. The provision in the policy that if the answers, &c., should be found in any respect false or fraudulent, the policy should be void, was not a waiver or merger of the previous provisions in respect to the truth of the answers, nor prevent them from being warranties. *ib.*
11. To prove the falsity of a statement, it is not necessary to prove that it was knowingly or intentionally false. *ib.*
12. In a policy of life insurance in which it is provided that if the declarations of the insured, and "upon the faith of which the policy is made, shall be found to be, in any respect, untrue," that then the policy shall be void, the entire truthfulness of such declarations is thereby made matter of warranty or condition precedent to a recovery upon the policy, and to avoid the policy it is not necessary that the declarations should be fraudulent as well as false, nor that they should be on a matter material to the contract, nor that the insurers should have issued the policy on the faith of the declarations. *Brennan v. Security, &c. Ins. Co.*, 296
13. In a contract of reinsurance in which it was provided that the loss, if any, should be payable *pro rata* and at the same time with the reinsured, *Held*, that the liability of the company reinsuring, accrued at the same time with the liability of the reinsured, and that in order to sustain an action it was not necessary that the company reinsured should have actually paid the loss, but it was sufficient if they were liable to pay. *Blackstone v. Allemania Fire Ins. Co.*, 299
14. Plaintiff, receiver of an insolvent insurance company which had reinsured its risk, after having suffered a loss, paid a dividend of 44 per cent. which exhausted the assets of the company; *Held*, that in a suit on the policy of reinsurance, under which the loss was payable *pro rata* and at the same time with the reinsured, the plaintiff was not restricted in his recovery to the amount actually paid to the insured, but could recover the whole amount of the loss. *ib.*
15. Plaintiff's husband assigned to her, with the consent of the defendants, a policy of insurance on his life, issued by them. A clause in the policy provided that failure to pay any note given for the premium should cause the policy to be void, without notice to any parties interested therein. At the time for payment of the annual premium (after the assignment had been made), defendants took, in part payment thereof, a note made by plaintiff's husband, dated Dec.

11th, 1869, payable four months after date, without grace, and having a clause providing that the policy was to be void in case the note was not paid at maturity, according to the contract in said policy. No demand of payment of the note was made, and on April 12th, 1870, the amount of the note was tendered to the defendants, who refused to receive it. *Held*, 1. That no demand of payment of the note was necessary; 2. That the note fell due on April 11th, 1870; 3. That the note not having been paid at maturity, all the rights of the plaintiff under the policy were forfeited, and the policy was void by its own conditions. *Roehner v. Knickerbocker Life Ins. Co.*, 512

INTEREST.

See PRACTICE, 1, 2.

J.

JOINT STOCK COMPANIES.

1. The complaint in an action for rent against the individual members of a club composed of more than seven persons, alleged that the defendants were members and partners in said club at the time of the letting in question; that the lease was made to three of the members in pursuance of the authority and direction of said club, and for its use; that the members of said club subsequently ratified said lease, and entered into the possession of and occupied said premises for a certain time, and had paid various sums on account of the rent thereof, leaving due a balance for which judgment was asked. *Held*, on demurrer, 1. That the complaint contained facts sufficient to hold the defendants liable as assignees of the lease, and did not show any facts which made the club such an association as is intended by Laws of 1851, p. 838, c. 455, extending to

them the provisions of Laws of 1849, p. 389, c. 258, in relation to joint stock companies, as amended by Laws of 1852, c. 153. 2. That even if the association came within the act of 1853, yet the suit might still be brought against the individual members of the club, since the act of 1853, compelling suits in the first instance to be brought against the president, &c., did not affect the act of 1851. *Waller v. Thomas*, 551

JUDICIAL SALE.

1. A purchaser at a judicial sale, under a judgment of the Supreme Court, in foreclosure, obtains a good title, even though an appeal has been taken from the judgment, and it is afterwards reversed, provided no stay of proceedings has been obtained upon the appeal. *Hening v. Punnett*, 543
2. Nor does it make any difference that the purchaser is a party to the foreclosure suit. *ib.*
3. A judgment of a court having jurisdiction of the subject-matter and of the parties, is a complete protection to a purchaser under it, whether he be a party to the judgment or not. *ib.*

L.

LANDLORD AND TENANT.

1. A tenant who has been evicted from a part of the demised premises, does not, by the mere fact of his demanding of his landlord a sum by way of rent for the premises from which he has been evicted, waive his right of action for damages for the eviction. *Drucker v. Simon*, 53
2. In the trial of an action for damages for an eviction, it is error to allow evidence as to the difference between the rent of the demised premises and those to which the

good state and condition as reasonable wear and tear would permit, but providing that he should have the right to make any inside alterations he might think proper, provided they did not injure the premises;—removed the partitions on the upper floors of the leased building, so as to use them for lofts instead of apartments for hotel purposes, *Held*, that this was within the privilege granted him by the lease, unless the pecuniary value of the premises as a whole was thereby injured. *Agate v. Lowenbein* (No. 2), 262

7. Under such a lease, the remedy of the owner for injury occurring to the property during the term, is confined to such unauthorized and unlawful acts in the nature of waste, as necessarily occasion injury to his reversionary interest. *Id.*

8. But the fact that the making of

own expense.

Id.

12. The mere agreement of the landlord to repair, has reference only to the condition of the building or premises demised, for the purpose of their profitable use; and the pecuniary benefit to be derived from their enjoyment, or loss from being deprived of their use in such state of repair as the agreement intended. Such an agreement in no way contemplates destruction of life or casualties to the person or property of any one, which might accidentally result from an omission to fulfil the agreement. *Id.*

M.

MARINE AND DISTRICT COURTS.

1. Where infinite mischief would ensue should the court in the con-

struction of a statute adopt a different rule from that which has been long established, the court will yield the construction which it would otherwise put upon the words of the act, to that construction which is universally received, and has been long acted on. *Van Loon v. Lyon*, 149

2. The provisions of the district court act (L. 1857, ch. 344) having been interpreted to authorize the issuing of an attachment upon the giving of an undertaking in a certain form, and such interpretation having for fourteen years been accepted and acted upon by the justices of the District Courts and the counsellors of the Supreme Court, practicing therein, *Held*, that such interpretation of the act, even though erroneous, would be upheld, where the adoption of a different rule would cause great mischief. *ib.*

3. *It seems* that to give a justice of one of the District Courts of the city of New York jurisdiction to issue an attachment, the applicant must give a bond such as is required by the Revised Statutes (§ 29, art. 2, tit. 4, ch. 2, pt. 3) in cases where attachments are issued by justices of the peace in suits for \$100 or less. Those provisions of the Revised Statutes are re-enacted by the district court act (Laws of 1857, ch. 344, § 20). *Per J. F. DALY, J.* *ib.*

4. On appeal to this court from a judgment rendered in a District Court, the notice of appeal required by § 358 of the Code of Procedure should point out clearly the error complained of, whether in the process, pleadings, proceedings on the trial, or in the rendering of judgment. It is not enough to state generally that the judgment appealed from is against both the law and the evidence, and should have been in favor of the appellants and against the respondents. *Begley v. Chose*, 157

5. Where the notice of appeal states

no more than this, the judgment will be affirmed without an examination of the merits. *ib.*

6. In the provisions of the Code of Procedure relative to appeals from judgments of the Marine Court (§§ 351 to 371 inclusive), the term "*justice*" is used as correlative, or of equivalent meaning, with the various terms "Marine Court," "Assistant Justices' Courts of New York city," and "Justices' Courts of cities," or as synonymous with the term "the court below." *Boomer v. Brown*, 229

7. Under the provisions, therefore, of § 371 of the Code of Procedure in regard to costs, on appeal to the Common Pleas, which provide that "wherever costs are awarded to the appellant, he shall be allowed to tax, as part thereof, the costs and fees paid to the *justice* on making the appeal, as disbursements, in addition to the costs in the appellate court; and when the judgment in the suit *before the justice* was against such appellants, he shall further be allowed to tax the costs incurred by him, which he would have been entitled to recover in case the judgment below had been rendered in his favor;"—on an appeal from a judgment of the general term of the New York Marine Court, the appellant on reversal may tax as costs the fee paid to the clerk of the Marine Court for making the return, and also the costs incurred by him which he would have been entitled to recover in case the judgment in the Marine Court had been in his favor. *ib.*

The case of *Ellert v. Kelly* (4 E. D. Smith, 12) distinguished and explained. *ib.*

8. By the district court act, as amended in 1862 (L. 1862, ch. 484, § 3), which provides that the rules and regulations of the Supreme Court shall apply to the District Courts as far as they can be made applicable, a subsequent action cannot be brought in a District

governing cases of like character as to which this court has original jurisdiction. *Ludwig v. Minot*, 481

10. In the New York Marine Court under Laws of 1881, ch. 800, § 84, an action cannot be commenced against a resident defendant by short attachment. The attachment in such cases must be returnable in not less than six nor more than twelve days, and must (except as otherwise provided by § 86) be served in accordance with 2 R. S. pt. 3, ch. 2, tit. 4, art. 2. *Haviland v. Wehle*, 549

11. A corporation sued in the New York Marine Court, in an action over the subject-matter of which the court has jurisdiction, waives any objection to the jurisdiction of the person by appearing and contesting on the merits. *Carpenster v. Central Park, &c. R. R. Co.*, 550

See ATTACHMENT, 1.

MARRIED WOMEN.

1. Since the act of 1860 (Laws of 1860, p. 157, ch. 90), by which a married woman is authorized to

against her in the hands of a *bona fide* holder for value, to whom it was indorsed before maturity. 40.

MASTER AND SERVANT.

1. A servant wrongfully discharged by his master cannot wait till the expiration of the period for which he was hired, and then sue for his whole wages on the ground of a constructive service. His only remedy is an action for the breach of the contract of hiring. *Moody v. Leverich*, 401
2. When wrongfully dismissed, he is restricted either to an action to recover for the services actually rendered, or to a general action for damages for the breach of the contract; in which he may recover any amount due for services, and also compensation for damages sustained by the further breach of the contract, in wrongfully dismissing him. 40.
3. Plaintiff was engaged to perform as an actor at a certain theater for a definite time, and at a fixed salary, but was discharged before the period for which he was engaged had elapsed. He denied the de-

fendant's right to discharge him, and offered performance on his part, which was not accepted. He then left the city and remained absent until the period for which he was engaged had expired, and did not, during that period, hold himself in readiness to render his services according to the contract, nor did he make any efforts to obtain other employment. *Held*, that he was not entitled to recover anything but the wages due him up to the time of his departure. *Polk v. Daly*, 411

See CONTRACTS, 6, 7, 8.
NEGLIGENCE, 9, 10.

MECHANICS' LIEN.

1. Under the provisions of the mechanics' lien law for the city of New York (Laws of 1863, ch. 500, § 11), which provide that the lien shall cease after one year, if it be not continued by order of the court, the fact that an action for the foreclosure of the lien has been commenced within the year does not preserve the lien beyond the year. *Schaettler v. Gardiner*, 56
2. But as between the lienor and parties personally liable to him, who have appeared in the proceedings, and joined issue on the merits, a judgment on the merits may be rendered after the lien has expired. *ib.*
3. Where the sub-contractor files a lien against the contractor and owner, and the contractor deposits in court, under § 10 of the act, the amount claimed with costs, the proceedings as against the owner, if he is not sought to be made personally liable, should be dismissed. *ib.*
4. The rule of the Supreme Court requiring exceptions to the referee's report to be heard in the first instance at the special term, does not apply to a reference of the issues in proceedings for foreclosure of mechanics' liens. *ib.*
5. Under the mechanics' lien law, for New York city (Laws of 1863, ch. 500), the "owner" intended is the owner of the erection, and not of the lands on which it is placed. *Muldoon v. Pitt*, 105
6. The lessee of premises in New York city, holding under a lease covenanting that no alterations should be made except by the written consent of the lessors, wished to make certain alterations, but the lessors refused permission unless they were made in a certain way. By the lessee's consent and direction, therefore, the lessors superintended the work and gave directions concerning it. *Held*, that they did not thereby make themselves liable to the contractor who did the work, for an unpaid balance due him from the lessee. *ib.*
7. The owner of certain lots in the city of New York agreed to sell them and make advances to the purchasers to enable them to build, and upon the completion of the buildings, to deliver a deed. The purchasers contracted with the plaintiff's assignor to furnish certain materials for the building, and on account of the materials thus furnished a mechanic's lien was filed against the owner of the lots. *Held*, it could not be enforced. *Hallahan v. Herbert*, 209
8. The act of 1863 (Laws of 1863, ch. 500), in regard to mechanics' liens in New York city, which provides for a discharge of the lien effected under that act by an entry on the judgment docket, by order of the court, that the judgment rendered in a proceeding to enforce the lien has been "secured on appeal," does not interfere with liens acquired under the provisions of previous acts (acts of 1851 and of 1855), or authorize their discharge upon the terms or in the manner provided as to those acquired under the act of 1863. *ib.*
9. Nor is there any provision of the

of the claim is substituted as plaintiff by an order of the court.

Id.

13. Where the owner appears and denies the debt, under § 8 of the act of 1851, a personal judgment may be rendered against the owner and contracting party, which may be enforced by execution, as in other actions. *Id.*

14. Where, under the mechanics' lien law of 1863, the owner admits that a certain amount is due by him under the contract, and that amount is insufficient to satisfy all the liens, so that the question of priority of liens becomes material, or the validity of any lien is questioned, the report of the referee, as the statute directs, is to be in a summary manner, as in claims to surplus moneys in mortgage cases, to enable the court to distribute the fund to the parties entitled to it; which report

cordance with the practice of courts of equity, except so far as it has been modified by statute. *Id.*

17. The object of the law in requiring the notice of the lien to state the amount claimed, and *from whom*, is in order to distinguish the claim of a sub-contractor, who has simply a lien on the building to the extent of the amount which may be due from the owner to the contractor, and the claim of one having a contract directly with the owner, who has not only a lien upon the building, but the right also to a personal judgment against the owner. *Id.*

18. Where the claim was due to three persons jointly, and the notice stated that it was due to one of them only, *Held*, that the notice did not comply with the provision of the statute requiring that the notice shall state "*to whom the amount claimed is due,*" and that,

- consequently, no lien was created by it. *ib.*
19. The lien given by the statute being a personal right, the right to create it cannot be assigned or transferred to another. Whether, where two of three joint contractors relinquish all their joint interest in the claim to their co-contractor, he can acquire a lien by stating in the notice filed that the claim is due to him. *Quære.* Where he filed such a notice, and his co-contractors, after the filing of it and the institution of proceedings to foreclose the lien, assigned all their joint interest to him; *Held*, that this would not cure the defect in the notice; that no lien can be created where anything is omitted, which, by the statute, is expressly required in the notice. *ib.*
20. Where the claim is against the owner, it does not invalidate the notice that it states that another (in this case the contractor) is jointly liable with the owner. It is sufficient that it states that the amount is claimed from the owner upon a contract made with him, and that the joint responsibility of another is coupled with him is immaterial. It is a matter of defense for the person so joined, but not a defect of which the owner can take advantage. *ib.*
21. The filing of the notice is the foundation of a proceeding in which a personal judgment may be rendered against the party who ordered or contracted for the work or for the materials, and it is his right that any decision or judgment that may be rendered in his favor upon the contract should be conclusive upon the parties to it. *ib.*
22. Under the act of 1863 (which differs in this respect from the acts of 1851 and 1855), a claim against the contractor and a claim against the owner may be joined in the same notice, provided each claim is separately distinguished, and the court may enforce one as a lien upon the building to the extent of the payments due by the owner to the contractor, and as respects the other, not only enforce it as a lien upon the building, but render a personal judgment against the owner for the amount of it. But a claim stated in the notice to be against the contractor must, in the foreclosure of the lien, be shown to be a claim of that description, and it will not suffice to show that it is a claim founded upon a contract with the owner, and upon a claim stated in the notice to be against the contractor, a personal judgment cannot be rendered against the owner. *ib.*
23. The lien attaches only to so much of the materials as were furnished within three months prior to the filing of the notice, even though all the materials were furnished under one contract, and the notice was filed within three months from the completion of the contract. *ib.*
24. A personal judgment cannot be given for materials furnished more than three months before the filing of the notice of lien, unless all the materials were furnished under one contract, in which case *it seems* that the court having acquired jurisdiction in respect to the contract, by the action to foreclose a lien acquired under it, it can give the relief which the statute contemplates, in the rendition of a personal judgment, under the rule that where a court of equity has gained jurisdiction of a cause for one purpose, it may determine the whole matter in controversy, to prevent further needless litigation or multiplicity of suits, and can give further relief without the assistance of a jury. *ib.*
25. But where each item delivered constitutes an independent contract, as to which the statute of limitations would run from the day of its delivery, this cannot be done. *ib.*
26. Under the mechanics' lien law

for the city of New York (Laws of 1863, ch. 500, § 11), by which the lien ceases after the expiration of one year, unless renewed; *Held*, that a judgment in an action to foreclose the lien, ordering the property to be sold, was invalid if rendered more than a year after the filing of the lien, and without a renewal of it, and would be reversed on appeal, although the objection was not raised on the trial, and no motion had been made to vacate the judgment. *O'Donnell v. Rosenberg*, 555

27. *It seems* that, as in the case of liens by judgment, the actual sale must occur, and the acquisition of a title by a purchaser be effected before the expiration of the lien. *ib.*

28. The cessation or expiration of the lien is not a subject of defense to be set up and proved by the owner, but its continuance is the only basis of any judgment *in rem* of foreclosure and sale. *ib.*

29. A clause in a building contract provided that any neglect to comply with the conditions of the contract, &c., should be sufficient cause for the employer to claim damages at the rate of ten dollars for each day's detention so caused; *Held*, that this was a covenant for stipulated damages, and the employer was entitled to recover at that rate for delay occurring without his contributory negligence or consent. *ib.*

MINING AND MANUFACTURING COMPANIES.

See PLEADING, 13.

MISTAKE.

1. As a general rule, a court of equity will only interfere to correct a mistake in a written instrument, where it has been mutual, and does not embody the terms, as fully understood by *both* parties. But this rule does not prevail,

cither where the party against whom the relief is sought has acted in bad faith or disingenuously, with full apprehension that the instrument did not express what the other party desired or intended, or where confidence was reposed in him, and he was intrusted with and assumed the preparation of the instrument, but has, in its preparation, either wilfully or negligently, omitted what had been clearly stated to him as the intention of the other party, who, relying on its correctness, and without particular examination of the document so prepared, incautiously assents to it, under the supposition that it conforms to the verbal terms of the negotiation, as previously agreed upon. *Brisco v. Pacific Mutual Ins. Co.*, 246

2. Plaintiff being insured with defendants by a maritime policy providing that "no shipment was to be considered insured until approved and indorsed on the policy by the company," received advices of a shipment for his account, and took the letter of advice, together with the invoice and bill of lading, to defendants, to have the shipment entered on the policy, and for that purpose left them with defendants' president. The latter made an indorsement on the policy, but not according to the bill of lading, writing "eight boxes of indigo," instead of "18 boxes," and omitting to state that the vessel having the goods on board was to proceed from La Union to Panama "*via* Realejo." Plaintiff did not see the indorsement on the policy until after the loss occurred, and then discovered, for the first time, that it was not according to the bill of lading. *Held*, that the policy would be reformed so as to make the indorsement correspond with bill of lading. *ib.*

MONEY PAID.

1. In a suit brought (under 2 R. S.

of 1813, ch. 86, § 175, p. 408) to recover money paid for an assessment, which ought to have been paid by another person, as so much money paid for the use of the person who ought to have paid the same, the facts showing the legality of the assessment must be proved, although it is provided by that act, that, in such a suit, the assessment, with proof of payment, shall be conclusive evidence. *Weinberger v. Fauerbach*, 554

N.

NEGLIGENCE.

1. The plaintiff was injured while passing along the public street, by the falling of the stone coping from defendant's chimney. But, it not appearing that the chimney was insecure, or unfit for the purpose for which it was intended, and it being shown that the stone coping was accidentally thrown off the chimney by a third person, while in the improper and unauthorized use of it, *Held*, that the defendant was not liable as for negligence, and a nonsuit should have been directed. *Scullin v. Dolan*, 163
2. Where plaintiff proved that while riding as a passenger in one of the defendants' cars, the car in which he rode was, by reason of the breaking of one of the rails, overturned, in consequence of which his shoulder-blade was broken, and without imputation of negligence on his part, the sustained serious injury; *Held*, that he had made out a *prima facie* case of negligence on the part of the defendants, entitling him to damages. *Brignoli v. Chicago & Great Eastern Railway Co.*, 182
3. It having appeared on the trial that the accident by which the plaintiff was injured was caused directly by the breaking of a rail, but that the breaking of the rail was due to the unsound condition of a wooden cross-tie; *Held*, that the judge was right in refusing to charge the jury "that if the track and rails of the defendants (a railroad company) were sound immediately prior to the accident, and there was no defect in the rail which could have been discovered by any examination, the defendants were not responsible for the damage caused by the accident," on the ground that it tended to misdirect the minds of the jury from the real cause of the accident, which was the defect in the cross-tie. *ib.*
4. In estimating the damages in such cases, personal suffering, as well as medical expenses and the direct pecuniary loss, are the subjects for compensation. *ib.*
5. The jury may also take into account the probable profits of the engagements, or probable earnings of the plaintiff, after the time of the accident and during the disability arising therefrom. *ib.*
6. In an action against a steamboat company for negligence, whereby defendant, while passing along the gang plank from the wharf to the deck of a steamboat, was thrown into the water; *Held*, that plaintiff might show that since the accident the steamboat company had used a gang plank with handrails, and constructed with the design of preventing similar accidents. *Baldwin v. N. Y. & H. Navigation Co.* 314
7. Where it appeared that the accident was due to the negligence of a deck hand in pulling in the plank, without observing that plaintiff was on it, *Held*, that exemplary damages could not be given. *ib.*
8. *It seems*, that if the deck hand had seen plaintiff standing on the plank, and had pulled it in with the intention of throwing him into the water, it would be a malicious act, for which the steamboat

- company would not have been liable. *ib.*
9. A coachman, after having used his master's horse and carriage in going upon an errand for his master, instead of taking it to the stable, used it in going upon an errand of his own, without his master's knowledge or consent. While doing so, he negligently ran into and injured the plaintiff's horse. *Held*, that his master was not liable. *Sheridan v. Charlick*, 338
10. If a negligent act be done by a servant while he is at liberty from service and pursuing his own ends exclusively, the master is not liable for the injury produced thereby, even if it could not have been committed without facilities afforded to the servant by his relations to his master. *ib.*
11. The case of *Mitchell v. Crassweller*, 18 C. B., 237, approved and followed. *ib.*
12. Plaintiff while riding in one of the defendants' horse cars was injured in consequence of a runaway team of horses belonging to the defendants running into the rear of the car in which she was sitting. It was proved that the runaway horses had been worked together every day for more than six weeks previous to the accident, had given entire satisfaction, and were considered perfectly safe. It appeared that the driver of them was not in good health, but there was nothing to show that his disease was such a one as prevented him from performing his duties as driver. *Held*, that there was no evidence of negligence on the part of the defendants. *Quinlan v. Sixth Avenue R. R. Co.*, 487
13. A street railroad is responsible for an accident which could not have occurred except for the improper laying of a rail, even though the municipal authorities were also negligent to the same extent in improperly paving the street. *Carpenter v. Central Park, &c. R. R. Co.*, 550
14. *It seems*, that a street railroad, having power to take up and replace pavement on the line of its road, is responsible for an accident occurring through defective pavement on their track, even though the municipal authorities are bound to keep the pavement in repair. *ib.*
15. Where a child three years of age was, through the inattention of its parents, injured by falling from a piazza—a part of the private premises of the family in a tenement house—known to the parents to be defective and insecure by reason of natural decay; *Held*, a case of contributory negligence on the part of the parents in charge of a child too young to exercise discretion to avoid such a danger. *Flynn v. Hatton*, 552
16. The rights of recovery of a child for negligent injury to its person, are controlled by the neglect of its parents, to the same extent as if it were capable of governing its own conduct, and had been equally neglectful. *ib.*
17. Plaintiff, who was a manufacturer of photographic views, purchased of defendants "hyposulphate of soda," and they by mistake delivered to him "sulphate of iron," which, being used by his servant in the preparation of photographic views, caused damage. In a suit by him to recover for the loss thereby occasioned, it appeared by evidence given in his own behalf, that hyposulphate of soda is white or gray, while sulphate of iron is green, and the two could be readily distinguished, and that the plaintiff's servant who used the sulphate of iron whereby the loss occurred, could by mere inspection have detected the mistake, and thereby prevented the accident; *Held*, that

the failure to make such inspection was contributory negligence on the part of the plaintiff, which barred his recovery, and he should have been nonsuited. *Van Lien v. Scoville Manufacturing Co.*, 554

See PLEADING, 14.
• RAILROADS, 2.

P.

PARTIES.

The defendants, a firm, by a written agreement, contracted to employ the plaintiff as a clerk for the period of five years, the latter agreeing to act for them and their successors and assigns under their direction and control. Before the expiration of the five years, the defendants' firm dissolved, and was succeeded in business by a new firm, with which the plaintiff continued in service. *Held*, that in a suit upon the contract, for wages earned after the dissolution, and while the plaintiff was in the service of the new firm, it was not necessary to join as parties defendant the members of the new firm, who were not parties to the written agreement. *Smith v. Douglass*, 191

PARTNERSHIP.

It seems, that the active member of a firm, who manages the whole business, is entitled to dismiss any employee, who is not engaged under a valid agreement for a definite period; and if the latter persists in remaining, under the countenance and support of the dormant partners, he cannot maintain any action against the members of the firm jointly, and is limited to such remedy as he may have against those by whose request and authority he continues to render any service. *Briggs v. Smith*, 110

PILOTS.

1. The term "ship's husband" is used to designate the person who, in the home port where the vessel belongs, does what the owner would otherwise do—obtains a cargo for her and attends to everything essential to the due prosecution of the voyage for which the cargo has been obtained. While the ship is abroad the master is empowered to do all that is essential during the voyage. He may be said to be then the ship's husband, except so far as he may be limited by his instructions, and if the duties which he would otherwise discharge in a foreign port with respect to the vessel, such as entering her at the customs, collecting the freight, obtaining a cargo and clearing the vessel, are, by the owners' directions, intrusted to a person at that port, then she is consigned to that person, and he is properly called the "consignee." *Gillespie v. Winberg*, 318
2. Such a person is the one meant in the act to amend the pilot laws (Laws of 1857, p. 502, ch. 243), which provides that pilotage shall be paid by the master, "owners or consignees," where the master refuses to take a pilot upon coming into the port of New York by way of Sandy Hook. *ib.*
3. It is provided by the original act of 1853 (Laws of 1853, p. 925, ch. 467, § 18), to which the act of 1857 is amendatory, that the pilotage shall be payable by the master, owner, consignee or agent *clearing the vessel*. The term "consignee," as there used, means the consignee of the vessel, and not of the goods, and the term "consignees" in the amendatory act must be taken to mean those upon whom, under that designation, the duty of paying pilotage was previously imposed. *ib.*
4. In an action under the act of 1857, for refusing to take a pilot

- on board, it appeared that the defendant was a ship broker who had procured a cargo for the vessel and cleared her at the custom house for Baracoa, where she took in a cargo, and that upon returning here with a cargo consigned to a third person, the captain reported to the defendant, who collected the freight and paid the bills for the vessel, and cleared her for another voyage. Upon coming into New York on her return from Baracoa, she refused a pilot; *Held*, that the defendant was the consignee within the meaning of the act, and the action was properly brought against him. *ib.*
5. The act of 1857 is to be liberally construed, since it is a remedial statute, both in the fact that it is amendatory of a defect in an existing law, and that the statute of which it is amendatory is in the nature of a public regulation for the protection of life and property, which may be put in peril from the want of proper precaution in navigating vessels entering the harbor of New York. Such a statute is to be liberally and beneficially construed, and everything is to be done in advancement of the remedy that can be done, consistently with any construction that can be put upon it. *ib.*
 6. By the first section of the act for the regulation of the port of New York (2 Laws of 1857, p. 487, ch. 671, § 1, as amended by 1 Laws of 1872, p. 993, ch. 409), two distinct offenses are prohibited, and separate penalties imposed for each: 1. Throwing ashes or cinders into the waters of the port; and 2. Putting ashes &c. into the water through a pipe or opening. *Board of Commissioners of Pilots v. Frost*, 358
 7. The penalty for a violation of the second provision is incurred only after service of the notice required by the act, but in order to recover the penalty under the first provision, no notice is required. *ib.*
 8. For the commission of the offense prohibited by the first provision, the master as well as the owners of the steamboat is liable; but for a violation of the second provision, a personal liability is fastened on the owners only. *ib.*
 9. Throwing ashes or cinders into the water through an opening cut in the deck, is an offense within the first provision of the statute, for which the master is liable. *ib.*
 10. A coastwise sea-going steam vessel not sailing under register, within the meaning of § 51 of the act of Congress of February 28th, 1871, in relation to pilotage for steam vessels, is one that is enrolled and licensed for the coasting trade in the manner provided by law, whose license is renewable annually: a vessel sailing from one part of the coast of the United States to another, or which is employed in the whale or coast fisheries. *Murray v. Clark*, 468
 11. The casual circumstance of such a vessel's stopping at a foreign port from stress of weather or other justifiable cause, not in the way of business or traffic, does not affect her specific character as a "coastwise sea-going steam vessel," under the United States act. *ib.*
 12. Proof that plaintiff, ten miles from Sandy Hook, offered his services as pilot, and that at that time there was no pilot on board of the vessel, *Held*, sufficient to show that plaintiff was the first pilot speaking or offering his services to the vessel. *ib.*
 13. A pilot may recover the penalty for refusing to accept his services provided for by the pilotage laws (1 Laws of 1857, p. 500, ch. 248, § 29), although the offer and refusal were made beyond the territorial jurisdiction of the State. *Wilson v. Mills*, 549

PLEADING.

1. The province of a supplementa

complaint is to present such facts material to the case, occurring after the making of the former complaint, as aid the original statement of a cause of action or tend to vary the relief to which the plaintiff is thereby entitled, or which tend to perfect an inchoate right so stated, which has since been made or become complete. *Bostwick v. Menck*, 68

2. Such supplemental matter, however, can, with the original complaint, constitute but one cause of action, and if the cause of action sought to be enforced by the original complaint did not exist or was defective at the time of the commencement of the action, it cannot be created, cured or aided by matters subsequently occurring. The matters subsequently occurring and sought to be introduced by supplemental complaint must be such as do not change the rights or interests of the parties before the court, but must merely refer to and support the same title alleged in the complaint, and already presented to the court. A new substantive cause of action cannot be supplied or introduced into the case by supplemental bill. *ib.*
3. Where a receiver appointed in supplementary proceedings, brings an action to set aside a conveyance fraudulently made by the judgment debtor, and subsequent to the commencement of the action, other judgments are recovered against the same party, and he is appointed receiver in supplementary proceedings taken on behalf of other judgment creditors, he cannot, by a supplemental complaint, include these claims in the original action. *ib.*
4. Where the answer in an action for conversion sets up that the title of the plaintiffs in the property is that of mortgagees only, and that defendant is entitled upon making a payment, to withdraw a proportionate part of the hypothecated property, and that he has made such a payment, for which, in making demand of the goods, the plaintiffs have made no allowance;—this is an admission of a valid transfer of an interest in the goods to plaintiffs, and of their right to recover for a proportionate part, as well as of a demand for the goods. Per *ROBINSON, J. Gomez v. Kamping*, 77
5. Under such pleadings, the defendant will not be permitted to show, on the trial, that the plaintiffs had no interest in the goods whatever, nor that defendant holds them as a bailee for the plaintiffs. *ib.*
6. In an action on a judgment, the defendant will not be permitted to show, under a general denial, that the judgment sued on was, subsequent to its entry, vacated by order of court. The vacation of the judgment should be specially pleaded, as matter in avoidance. *Carpenter v. Goodwin*, 89
7. Where such an order is put in evidence, under a general denial, in a suit on the judgment, and no application is made to the court at the trial to amend the pleadings, the judgment will, on appeal, be reversed, and the court will refuse to disregard the defect, or to order the amendment to be made *nunc pro tunc*. *ib.*
8. Where the pleadings will be conformed to the proof—stated. *Kock v. Bonitz*, 117
9. Where damages which, though the natural consequences of an act, are not necessarily the result of it, are sought to be recovered, they must be specially alleged in the complaint. Such allegation of damage is not traversable matter, but must be inserted in the complaint, in order that the defendant may be prepared with evidence to rebut the proof offered of such damage, or the amount or extent of it. *Baldwin v. N. Y. & H. Navigation Co.*, 814
10. If averments of such special

damage are not originally inserted in the complaint, the judge may allow it to be done by amendment on the trial, when no injury will result to the defendant from it. *ib.*

11. It will be assumed on appeal that the defendant was not injured by the allowance of the amendment, where the defendant at the trial merely made a general objection, but did not state any particulars in which he would be injured, such as showing the absence of witnesses who might have been procured, &c. *ib.*

12. The practice recognized and acted upon in *Miller v. Garling*, (12 How. Pr. 203), approved to the extent of the rule above stated. *ib.*

13. In an action against defendants, as trustees of a corporation formed under the general manufacturing act (Laws of 1848, ch. 40), for neglect to make, file and publish the yearly report required by § 12 of that act, it was set up as a defense that during all the time of the alleged default of the defendants to comply with the provisions of the statute, one A. B. was also a trustee of the company and should be made a party defendant. *Held*, 1. That this was a mere dilatory plea, in which great strictness should be exacted in requiring the presentment of every material fact essential to such a defense, and was bad unless it showed that the person claimed to be jointly liable was living. 2. That the liability of the defendants in such a case was in tort and not on contract, and that a non-joinder of some of them constituted no defense. *Strong v. Sproul*, 326

14. The plaintiffs occupied the first story and basement of a store in which the second and upper stories were occupied by defendant, and in an action for negligence on the part of the defendant in allowing the croton water to overflow and flood the plaintiffs' premises, the defendant pleaded

that the plaintiffs, at the time of the injury, had under their control the stop-cock regulating the flow of water to defendant's premises, and could at pleasure shut it off, and that the injury was caused by the negligence of the plaintiffs in failing to make use of the stop-cock or to make a proper use thereof; *Held*, that under these pleadings the defendant could prove an agreement on the part of the plaintiffs to turn off the water at night by the stop-cock under their control, so as to prevent it from flowing to the defendant's premises. *Brown v. Elliott*, 329

15. Under a general denial in an action for damage to plaintiffs' goods defendant can show that the goods injured did not belong to plaintiffs. Such defense need not be specially pleaded. *ib.*

See MECHANICS' LIEN, 10, 28.

PRACTICE.

1. Where the facts stated in a complaint upon a money demand on contract are admitted, and nothing is required to be done to entitle the plaintiff to a complete judgment in his favor, but a mere computation of interest on the demand for the period claimed, the defendant, upon an affirmative defense set up in his answer, has the right to open and close. *Brennan v. Security, &c. Ins. Co.*, 296

2. Interest is a mere incident to the principal sum claimed, and the amount is not the subject of controversy. In law it is entirely certain, in accordance with the rule that that is certain which can be rendered certain. *ib.*

3. Where a case is agreed upon and submitted in a controversy, without action, under § 372 of the Code of Procedure, the admissions contained in the case are binding on the parties agreeing to it, and although there may appear in the case evidence casting doubt on the

truth of the matter admitted, it will be presumed that there is other evidence not produced, or other reasons which induced the admission. *Fearing v. Irwin*, 885

4. In a dispute concerning the title to land forming part of an old road, where the question was whether it had been closed, it was admitted by the case agreed on, that when the road was closed, the title to the land would revert to the plaintiff, but according to the deed under which the plaintiff claimed, and which was set out in the case, the court was of opinion that the title to the land would not so revert; *Held*, that the admission was conclusive. *ib.*

5. If the admission was improvidently made, the injured party has his remedy by motion, to strike out or amend the admission. *ib.*

6. Where a motion is granted conditionally upon the failure of the opposing party to do a certain act, if the act is not performed, the proper practice is for the moving party to show, by affidavit, such failure to perform, and thereupon to apply *ex parte* for an order granting the motion absolutely. *Stewart v. Berge*, 477

7. On an appeal from a judgment of a District Court, and pending a stay of proceedings thereon, an order was made, on motion of the respondent, that the appeal should be dismissed unless the return was filed within a specified time. The return was not filed within such time, and the respondent upon filing an affidavit to that effect, issued execution on the judgment. *Held*, that this was irregular, and that the appeal was not dismissed without the entry of an order to that effect. *ib.*

See AMENDMENT,
ATTACHMENT,
PLEADING,
REFERENCE,
REMOVAL OF CAUSES.

PRINCIPAL AND AGENT.

It is a general principle of the law of agency, that one who procures services to be done for another is not himself chargeable as the debtor, unless he omits to make known his principal, or erroneously supposes that he has authority, or exceeds his authority, or expressly or impliedly engages to be answerable, either by distinctly promising to pay for them if rendered, or by doing or saying something which justifies the person who is to perform them, in supposing that the one who applies to him engages to pay therefor. *Buck v. Amidon*, 126

See CONTRACTS, 2.

R.

RAILROADS.

1. A railroad company which is permitted to lay its tracks through a public highway, is not subject in the running of its cars to the ordinary law of the road. It has exclusive right of way to that portion of the highway occupied by the tracks, and a truck or cart passing along the highway must turn out of the way for its cars, and the drivers of them cannot call upon the driver of the railroad company's car to stop, or do any other act to avoid a collision, if the same result can be attained by their turning out. *Barker v. Hudson River R. R. Co.*, 274

2. The plaintiffs' truck was being driven along between the curbstone of the sidewalk and the rail of defendants' track, and the driver saw defendants' car coming along drawn by horses, and another truck next to the curbstone and between himself and defendants' car, and seeing that there would not be sufficient room for the two trucks between defendants' car and the curbstone (he being then sixty or seventy yards distant from the car, and having plenty of room to turn

out and cross to the other side of the street where he would be out of danger), called to the driver of the car to stop, which defendants' driver failed to do, and both continuing to proceed, plaintiffs' horse and truck were caught between the car and the truck next to the curbstone, and were injured; *Held*, that the plaintiffs could not recover. *ib.*

3. A railroad corporation, incorporated under the laws of another State, but allowed by our laws to extend and operate its road in this State, is subject to our laws, and within the prohibition of our statute against exercising corporate powers beyond such as are expressly conferred by law or are necessary to the exercise of the general powers conferred, and a contract made by them in violation of such prohibition is *ultra vires* and void. *Milnor v. N. Y. & N. H. R. R. Co.*, 355

4. Defendants, a railroad corporation organized under the laws of Connecticut, for the purpose of constructing a railroad from New Haven, by way of Bridgeport, westerly to the line dividing the State of New York from Connecticut, were afterwards, by a law of this State, authorized to extend their railroad into this State. *Held*, that they came within the provisions of our law in respect to domestic corporations, and that they could not, in this State, make a contract for the carriage of passengers or their baggage beyond the limits of their own road. *ib.*

5. Where a railroad company assumes the duty of a carrier of freight and persons between certain points, established by their charter, and without special agreement to the contrary, their obligation commences when the freight or passenger is accepted for transportation, and terminates when safely delivered at the end of their route, and they are only liable as forwarders beyond the end of their

line, unless under a lawful contract extending their liability. *ib.*

6. The right of a passenger purchasing coupon tickets for different roads and sold at the office of one, is precisely the same as if the tickets had been purchased at the office of each road. *ib.*

See COMMON CARRIER, 8, 9.
NEGLIGENCE, 2, 3, 12, 13, 14.

RECEIVER.

See PLEADING, 3.

REFERENCE.

1. In an action by an attorney for various services, including the management of suits in various courts, the drawing of deeds and other instruments, the examination of titles to lands, charges for disbursements, &c., including many items, where a general denial is interposed; *Held*, that the trial of the issues involves the examination of a long account, and a compulsory reference may be ordered. *Schermerhorn v. Wood*, 158

2. But an allegation in an answer to a complaint, claiming \$4,500 for professional services due February 11th, 1862, that on May 21st, 1860, defendant paid to plaintiff \$275 in full of all demands to that date, which sum is set off against any claims of the plaintiff, *Held*, not to be an allegation of payment, which, if found in favor of defendant, would determine the action against the plaintiff, and that a compulsory reference might be ordered of all the issues. *ib.*

3. It is no ground for reversing an order of reference that on the trial one party intends to impeach, as forged, evidence which he expects will be offered by his adversary. Such fact is proper to be presented to the court on the motion for the

order, but the decision thereon is conclusive. *ib.*

4. A referee cannot claim more than three dollars a day for his services, unless there is a different agreement in writing. *Townsend v. Peyser,* 556

It seems, however, that if there is a parol agreement for a higher rate of compensation, and the referee makes a memorandum thereof on his minutes, this will be a sufficient agreement in writing. *Per* LOEW, J. *ib.*

REMOVAL OF CAUSES.

1. A suit in this court, commenced in December, 1865, by a plaintiff resident in this State, against a defendant also then resident here, but who, before the final determination thereof became a resident of another State; *Held,* not removable to the United States Circuit Court, under the acts of Congress of July 27th, 1866, or of March 2d, 1867, defendant being a resident of this State at the time of the passage of those acts. *Dart v. Walker,* 188
2. Where an application to remove a cause to the United States Circuit Court was founded upon the provisions of the act of 1867; *Held,* that, although the application must be denied under that act, still where the petition contained the necessary allegations the application might be granted under the act of 1866. *ib.*
3. Under a joint petition by two defendants, the application may, under the act of 1866, be granted as to one defendant and denied as to the other. *ib.*
4. Where a cause has been tried, but the judgment reversed on appeal and a new trial ordered, an application made before the new trial, is made "before trial or final hearing," within the meaning of the act. *ib.*

S.

SALES.

1. Defendant, having agreed to purchase a certain number of hides of plaintiffs, at a fixed price, accepted a delivery, but afterwards alleged that a part of them were of an inferior quality to that contracted for, and requested plaintiffs to take them back. Plaintiffs denied that the hides were inferior to the contract quality, but took them back as requested, and examined them, and having satisfied themselves that they were of the proper quality, tendered them again to the defendant, who refused to receive them. *Held,* a sufficient part delivery to take the case out of the statute of frauds. *Schultz v. Bradley,* 29
2. *Held further,* that plaintiffs, by taking back the hides, did not rescind the contract, or give an acquiescence to defendant's rejection of them amounting to a rescission, and that the hides being of the proper quality, they were entitled to recover damages for defendant's refusal to fulfil his contract. *ib.*
3. In such a case, *Held,* that plaintiffs might sell the goods at private sale, and without notice to defendant; and, provided the sale was a judicious one, could thereafter recover from defendant the difference between that price and the contract price. *ib.*
4. Where a party orders goods to be shipped to him, and directs the vendor to draw upon him at sight, and attach the bill of lading to the draft, this direction is evidence that the title in the goods is not to pass to the purchaser until the draft is paid. *Indiana National Bank v. Colgate,* 41
5. When goods are shipped or afloat the bill of lading represents them, and the indorsement and delivery of it has exactly the same effect as the delivery of the goods them-

selves, when the intention is to transfer thereby the title to the goods or to pledge them by way of security for advances made or otherwise. *ib.*

6. The owners of goods at Indianapolis, having forwarded them to New York, consigned to defendants, who were their factors, for sale, made a draft on defendants on account of the goods, and before delivery of the goods to defendants, induced plaintiff to discount the draft by indorsing and delivering to it the bill of lading; *Held*, that this operated as a valid pledge of the goods to plaintiff, and upon the failure of the defendants to pay the draft, plaintiff was entitled to demand of them the goods, or in case they had sold them, to maintain an action for the proceeds of the sale as money received to plaintiff's use. *ib.*

7. The defendant gave the plaintiffs an unsigned bill of sale for goods, and at the same time signed a receipt, reciting that he had received the goods on storage for plaintiffs. *Held*, that the two instruments were to be construed together, and made a valid sale, as the latter instrument was an acknowledgment of the consummation of the contract of sale, and was evidence that the defendant retained the goods as a mere bailee for the plaintiffs. *Gomes v. Kamping*, 77

8. Defendant being indebted to plaintiffs, on a note, gave them a bill of sale of certain goods for the amount due, and while retaining the possession of the goods, gave plaintiffs a storage receipt, acknowledging that he held them for plaintiffs. It was verbally agreed that defendant might have the goods again by paying the debt in a specified time, and plaintiffs retained the note. *Held*, this was a conditional sale, and not a mortgage of the goods. *ib.*

9. The plaintiffs shipped from Boston to C. at New York, certain goods

to be paid for "on arrival." On the arrival of the goods in New York, but before they had been delivered to C., and while they were in the possession of the carrier, they were levied on by the sheriff under an attachment issued to him in an action against C. *Held*, that as the goods had never come into the possession of C., no title thereto had passed to him or to any one claiming in his right, and the sheriff acquired no title by the attachment. *Clark v. Lynch*, 83

10. *Held*, also, that as C. had, previous to this purchase or immediately after, failed in business, of which fact the plaintiffs were ignorant when they shipped the goods, they had a right, in default of payment of the price, to reclaim the goods from the carrier or from the hands of any creditor or voluntary assignee of the purchaser, merely acting in his behalf or in the exercise of such rights as he possessed. *ib.*

11. *Held*, also, that the plaintiffs had a right to reclaim the goods by the power of stoppage *in transitu*, since the power which a purchaser of goods has of taking possession of the goods from the hands of the carrier, and thus determining the right of stoppage *in transitu*, cannot without his direct intervention be exercised by or on behalf of a creditor by way of attachment or levy upon his interest. *ib.*

12. The defendant bought a heater of the plaintiff, on condition that it should heat his house in a certain manner. After it was put up, the defendant complained to the plaintiff that it did not heat his house as agreed, and plaintiff made certain alterations in it, after which the defendant made no more complaints. *Held*, that the defendant must be regarded as having elected to keep the heater, but he did not thereby lose the right to sue for a breach of warranty, or to show the extent of its diminished value, by

way of abatement in an action for the price. *Butler v. Kellogg*, 108

18. A writing in the following words, viz : " This is to certify that I, A., sell to B., for the sum of \$17,000, the house (describing it), and that I have received \$75, the balance to be paid in thirty days," was signed by both A. and B., and was accepted by B., who paid to A. the \$75; *Held*, in an action against A. (the seller) by a broker, to recover his commission for effecting the alleged sale, that the signing of the instrument by B., and the payment of the \$75, was sufficient to show an agreement on his part to purchase the house at the price named, which a court of equity could specifically enforce; and that, accordingly, the broker was entitled to his commissions as for a sale effected. *Simonson v. Kiskick*, 148

14. No particular words are necessary to constitute a warranty. A representation or any positive affirmation of the state, quality, condition, or fitness of the thing sold, which may be supposed to have entered into the consideration of the sale, showing an intention to warrant, and which was so understood and relied upon by the purchaser, will amount to a warranty. *Murray v. Smith*, 277

15. Whether what passed between the parties amounted to a warranty, or was merely a recommendation or an expression of opinion, is a matter for the determination of the jury, unless the language used has a fixed or technical meaning. *ib.*

16. But where there is some confusion or misunderstanding between the parties as to whether the property was warranted as a certain thing, or of a certain quality, the undertaking of the parties, or the intent, must be left to the jury, and they are to say as to whether there was a warranty of

the goods as fit for a certain purpose, or as of a certain quality. *ib.*

17. Where goods are sold to be used for a certain purpose, and they are found by the purchaser to be unfit for such purpose, he is not obliged to return them, but may have his remedy by an action for the breach of the warranty, or recoup his damages in an action brought for the price. *ib.*

18. All that is ordinarily implied by the exhibition of a sample is that it has been fairly taken from the bulk, but any representation that the bulk is equal to the sample may amount to an express warranty. *ib.*

19. A broker having power to sell, may, unless he be specially restricted from doing so, sell with a warranty as to the quality of the articles sold, or as to its fitness for a particular use. *ib.*

20. Plaintiff sold to defendants by sample, certain barrels of lamp-black, with a warranty that all the lamp-black would come up to the sample shown, which had been taken from one barrel, and also with a warranty that the lamp-black was fit for making printers' ink. After the goods were delivered to defendants, they examined them and found that the barrels did not all come up to the sample, and plaintiff made a reduction in the price. Afterwards defendants discovered that the lamp-black was not fit for making printers' ink, and in a suit for the price set up a breach of warranty; *Held*, that although by agreeing to take the goods at the reduced price, defendants had waived their right to set up that the goods did not correspond with the sample, yet that they were not prevented from setting up the breach of the warranty that the lamp-black was fit for making printers' ink. *ib.*

See PLEADING, 4.

SPECIFIC PERFORMANCE.

1. A court of equity may enforce specific performance of a contract to sell land, although the land is situated in another State, and the contract was made and to be performed there, if the defendant was duly served and subjected to the jurisdiction of the court. *Myres v. DeMier*, 843
2. A covenant in a lease to repair will, in a proper case, be specifically enforced in equity. The cases in which the contrary is expressed, shown to have been loosely determined, without due examination of the authorities. *Beck v. Allison*, 421
3. What is to be done under the covenant, however, must be clear, definite, and certain, for if it be extensive, involving too many details, which demand the consideration of the particular circumstances and the exercise of judgment, as well as a long time for its performance, the party will, unless the equities are very strong, be left to his remedy in an action for damages. This branch of equitable jurisdiction is the exercise of a discretion which depends upon the facts and circumstances of each particular case. *ib.*
4. If the contract was just and fair when entered into, events afterwards occurring, which are not so involved in it that they must have been in the minds of the parties when the contract was made, cannot be invoked to show the hardship of and to excuse performance, unless they were in some way due to the party who applies for the specific performance. They may be taken into consideration, however, where the court can, instead of decreeing a specific performance, make a more equitable disposition of the whole matter. *ib.*
5. If the plaintiff knew, when he brought his suit, that the defendant could not perform, either from his having conveyed the property to another, or from any other cause, the complaint must be dismissed, the plaintiff's remedy being an action for damages, which is not only an adequate, but his sole remedy; the defendant in that case being entitled as matter of right to a trial by jury. *ib.*
6. But where it is averred in the complaint, and appears from the facts set forth in it, that the defendant can and ought to perform, the jurisdiction in equity attaches, the defendant is put to his answer, and the case comes before the court upon the issue and the proofs for its equitable consideration. If it then appear, upon the defendant's showing that he has disabled himself from performing, and in doing so acted inequitably, the court may decree to the plaintiff a compensation in money, to be ascertained by some equitable rule, or by a trial by jury; because the plaintiff, being ignorant when he brought his suit of the defendant's disability, had a right to bring it; and jurisdiction having attached by the institution of a suit justly and properly brought, it may be made effectual for the purpose of administering complete relief. *ib.*
7. The cases reviewed relating to the right of a court of equity, where it refuses a specific performance, to award a compensation in damages; their conflict with each other considered, and the rule deducible from them laid down. *ib.*
8. If jurisdiction in equity attaches, as where performance is not impossible, but exceedingly onerous, the court is not bound to decree a specific performance, if it can, by adapting the remedy to the special circumstances of the particular case, make a more equitable adjustment of the whole matter. Thus, where the covenant on the part of the landlord, in a lease of some years' standing, was, that he would repair all damages to the building occasioned by a fire, and

the building was so damaged by a fire that it could not, under the fire laws, be repaired from the old foundations, and the erection of a new structure became necessary, the court took into consideration that the building was very old; that it was unsuited to the locality where it was, being neither of the style, size, or strength required for the business usually carried on there; that it would—the lease then having but three years more to run—subject the landlord to great loss and injury to compel him, in fulfilment of the covenant, to erect such a building as the one destroyed;—the tenant refusing, if a building were erected suitable to the locality, to pay more rent for the remaining three years than he had previously paid, and insisting upon a strict fulfilment of the covenant,—and, in view of these circumstances, refused to enforce the specific performance of the covenant, but adjudged, instead, that the landlord should pay to the tenant the estimated excess of the value of the lease to him for the remaining three years over the rent he was to pay, which was ascertained and fixed by the court upon the trial, from evidence before it. *ib.*

9. A covenant, as respects its future performance, when the contingency arises which calls for its fulfilment, will be construed with reference to a public law or regulation enacted after the covenant was entered into, if the law or public regulation in any way affects it. *ib.*

10. Plaintiffs agreed to sell to defendant certain land which defendant agreed to buy at a certain price, to be paid by his assuming the payment of certain mortgages on the property and by conveying to plaintiffs certain other land belonging to him; *Held*, that this was not a sale of land but an exchange. *Sternberger v. McGovern*, 456

11. Defendant was unable to carry out his agreement on account of

the refusal of his wife to sign a deed releasing her dower, although he endeavored in good faith to induce her to do so. Plaintiffs were aware of these facts, and not having parted with possession of the land they had agreed to sell, nor delivered a deed thereof, they brought an action to enforce a lien for the purchase money, and asked to have the property sold and the proceeds applied to the payment of the purchase money, and for a personal judgment against the defendant for the balance; *Held*, 1. That not having parted with possession of the property, they could not maintain an action to enforce a vendor's lien for the price. 2. That as the defendant's inability to perform was set forth in the complaint, it showed that there was no ground for equitable jurisdiction; that the complaint should be dismissed, and the plaintiffs left to bring an action for damages for the breach of the contract. *ib.*

STREETS.

1. Under the act of 1867 (2 Laws of 1867, p. 1748, ch. 697), providing for altering the map or plan of certain portions of the city of New York; when the commissioners of Central Park have made and filed the maps provided for in §§ 2 and 8 of the act, a street which does not appear on the map is closed without any further proceeding. *Fearing v. Irwin*, 885
2. The estimate of loss and award of damage to the adjoining owners, is not a prerequisite to the closing of the street. *ib.*

STATUTE OF FRAUDS.

See CONTRACTS, 4, 19, 21.
SALES, 1.

STATUTE OF LIMITATIONS.

See EXECUTORS, 1.

SUPPLEMENTARY PROCEEDINGS.

See PLEADING, 8.

T.

TELEGRAPH COMPANIES.

1. Plaintiffs and defendants were the owners of parallel and competing telegraph lines between Cleveland, Ohio, and New York, and the defendants also controlled and managed, partly as owners and partly as lessees, a line from New York to Plaister Cove, in Nova Scotia, at which place their lines connected with certain foreign ones, making a chain of telegraphic connection between this country and Europe; *Held*, that the plaintiffs were not, within the meaning of the statutory provision, to be regarded as owners of parallel and competing lines between New York and Plaister Cove, in Nova Scotia, so as to authorize defendants to refuse to receive from them, at New York, messages to be transmitted along that line, directed to Europe. *Atlantic and Pacific Tel. Co. v. Western Union Tel. Co.* 527

2. Where defendants were engaged in the business of transmitting telegraph messages from New York to Europe; *Held*, that it was not unreasonable for them to require, where they receive dispatches in New York from other companies for transmission to Europe, that there should be attached to the telegram the date at which it was received by them in New York, and the name of the company from whom it came, so that the date at New York and the name of the company might be attached to and form a part of the dispatch in its transmission to Europe, nor that they should make an extra charge for this addition to the dispatch. *ib.*

3. A regulation of the defendants required when such messages were

received from other companies at New York for transmission along the defendants' line to Nova Scotia for Europe, that a power of attorney from the sender of the message should in each case be produced to the defendants, authorizing them to send the message, or it would be refused. *Held*, that the regulation was unreasonable, as it was imposing upon other companies what was practically impossible in the due and speedy transmission of messages along their lines for Europe; was manifestly enacted to give the defendants along their parallel lines the monopoly of all such messages, and if permitted, would defeat the provision of the statute, which enacts that every company in this State must receive and transmit a dispatch from another company, which is from or to an individual, unless in the case specially excepted. *ib.*

TORTS.

1. There is no contribution between joint wrong-doers. *Wehle v. Harland*, 550
2. In actions *ex delicto*, it is in the discretion of the jury to allow interest or not, but the plaintiff is not entitled to it as a matter of right. *ib.*

See PLEADING, 13.

TRUSTS.

See CORPORATIONS, 4.

U.

USURY.

1. A stockbroker agreed with his customer to carry certain stock for him on the latter's agreement to repay whatever rate of interest the broker might be obliged to pay to obtain the money for that purpose.

The broker was obliged to pay a usurious rate of interest for the money, and charged the same to the customer. *Held*, that as between the broker and his customer, this did not amount to an exaction of usury, so as to avoid the transaction between them. In such a case, the broker acts merely as the agent of his customer, and not as a principal. *Smith v. Heath*, 123

2. A promissory note was given in payment, in part, of a valid loan of money, and, in part, of an amount of usurious interest, exacted under another agreement disconnected with the loan. *Held*, that the valid loan, constituting part of the consideration of the note, not being affected by any suspicion of usury, was not discharged, and that the only relief to which the maker was entitled against the note was an abatement of so much of the amount thereof as was made up of the usurious interest. *Held*, therefore, that to entitle the maker to an injunction against the prosecution of the note, in an action brought for that purpose, he must offer to pay so much of the note as constituted the original valid in-

debtedness. Asking equity, the plaintiff should do equity. *ib.*

3. Where a note is given for full value and without any agreement for usury, the fact that on a subsequent settlement usurious interest is taken does not invalidate the note. *Emmons v. Barnes*, 418
4. A. applied to B. to discount his note, and B. agreed to do so, and offered him the money for it, without anything being said about usurious interest. At A.'s request only part of the money was paid him at that time, and in a subsequent settlement between them of the amount due A., illegal interest was taken by B.; *Held*, this did not invalidate the note. *ib.*

W.

WAIVER.

See SALES, 12.

WARRANTY.

See SALES.

